

Customs Bulletin

Regulations, Rulings, Decisions, and Notices
concerning Customs and related matters



and Decisions

of the United States Court of Appeals for
the Federal Circuit and the United
States Court of International Trade

Vol. 24

MARCH 14, 1990

No. 11

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 90-15)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST FOR JANUARY 1990

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holidays: Monday, January 1, 1990 and Monday, January 15, 1990.

Greece drachma:

January 2, 1990	\$0.006333
January 3, 1990 .....	.006250
January 4, 1990 .....	.006329
January 5, 1990 .....	.006347
January 8, 1990 .....	.006327
January 9, 1990 .....	.006361
January 10, 1990 .....	.006349
January 11, 1990 .....	.006349
January 12, 1990 .....	.006361
January 16, 1990 .....	.006289
January 17, 1990 .....	.006325
January 18, 1990 .....	.006283
January 19, 1990 .....	.006252
January 22, 1990 .....	.006250
January 23, 1990 .....	.006297
January 24, 1990 .....	.006341
January 25, 1990 .....	.006333
January 26, 1990 .....	.006333
January 29, 1990 .....	.006363
January 30, 1990 .....	.006369
January 31, 1990 .....	.006337

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list
for January 1990 (continued):

South Korea won:

January 2, 1990	N/A
January 3, 1990	\$0.001463
January 4, 1990	.001462
January 5, 1990	.001463
January 8, 1990	.001463
January 9, 1990	.001462
January 10, 1990	.001460
January 11, 1990	.001459
January 12, 1990	.001459
January 16, 1990	.001458
January 17, 1990	.001456
January 18, 1990	.001457
January 19, 1990	.001455
January 22, 1990	.001454
January 23, 1990	.001453
January 24, 1990	.001454
January 25, 1990	.001454
January 26, 1990	N/A
January 29, 1990	.001454
January 30, 1990	.001453
January 31, 1990	.001451

Taiwan N.T. dollar:

January 2, 1990	N/A
January 3, 1990	N/A
January 4, 1990	\$0.038300
January 5, 1990	.038425
January 8, 1990	.038588
January 9, 1990	.038476
January 10, 1990	N/A
January 11, 1990	.038347
January 12, 1990	.038388
January 16, 1990	N/A
January 17, 1990	.038340
January 18, 1990	.038278
January 19, 1990	.038329
January 22, 1990	.038241
January 23, 1990	N/A
January 24, 1990	.038226
January 25, 1990	.038239
January 26, 1990	N/A
January 29, 1990	N/A
January 30, 1990	N/A
January 31, 1990	.038267

(LIQ-03-01 S:NISD CIE)

Dated: February 12, 1990.

ANGELA DeGAETANO,
Chief,
Customs Information Exchange.

(T.D. 90-16)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATE FOR JANUARY 1990

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 90-4 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Holidays: Monday, January 1, 1990 and Monday, January 15, 1990.

Switzerland franc:

January 25, 1990	\$0.672043
January 29, 1990 .....	.672948
January 30, 1990 .....	.670691

(LIQ-03-01 S:NISD CIE)

Dated: February 12, 1990.

ANGELA DeGAETANO,
Chief,
Customs Information Exchange.

19 CFR Part 134

(T.D. 90-17)

COUNTRY OF ORIGIN RULES REGARDING IMPORTED
TEXTILES AND TEXTILE PRODUCTS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final interpretive rule.

SUMMARY: In 1985, Customs published final regulations setting forth criteria to be used for determining the country of origin of certain imported textiles and textile products. These criteria are applied in making country of origin determinations for all Customs purposes, including determinations for purposes of country of origin marking and for assessing duty on imported articles. This document changes positions and uniform and established practices regarding commercial processes and assembly operations performed on tex-

tiles which are inconsistent with the published country of origin criteria.

EFFECTIVE DATE: The change will be effective as to merchandise entered, or withdrawn from warehouse for consumption on or after June 29, 1990.

FOR FURTHER INFORMATION CONTACT: Phil Robins, Classification and Value Division, (202-566-8181).

SUPPLEMENTARY INFORMATION:

BACKGROUND

This document concerns certain Customs positions and practices relating to determining the country of origin of imported textiles and textile products which Customs is now changing. The subject positions and practices follow:

(1) The complete assembly of a garment in one country from pieces cut or otherwise manufactured in another country generally results in the country of assembly being considered the country of origin of the garment.

(2) Fabrics that are woven, knit or otherwise constructed in one country are considered, for all purposes, products of a second country if they are subjected to dyeing, printing (or dyeing and printing), bleaching, shower proofing (a process rendering the fabric water-repellent), or other finishing processes in the second country; and

(3) Lengths of fabric manufactured in one country and sent to another country for a simple cutting and hemming (or overlocking) operation are considered products of the second country. In this circumstance, the material may be readily identifiable as being intended primarily for a particular purpose and the cutting is done only to establish the length or the width of the completed article.

By T.D. 85-38, published in the Federal Register on March 5, 1985 (50 FR 8710), Customs amended Part 12, Customs Regulations (19 CFR Part 12), by adding a new § 12.130 which established criteria to be used by Customs officers in determining the country of origin of imported textiles and textile products for purposes of multi-lateral or bilateral textile agreements entered into by the U.S. pursuant to § 204, Agricultural Act of 1956, as amended (7 U.S.C. 1854).

According to § 12.130, Customs Regulations (19 CFR 12.130), if an article consists of materials produced or derived from, or processed in more than one country, territory, or insular possession, the article shall be a product of the country, territory, or insular possession where it last underwent a substantial transformation. A textile or textile product will be considered to have undergone a substantial transformation if it has been transformed by means of a substantial manufacturing or processing operation into a new and different article of commerce.

Section 12.130(d) lists the criteria that will be considered in determining whether there has been a substantial manufacturing or processing operation and whether a new and different article of commerce has resulted. Section 12.130(e)(2) sets forth five examples of processes that will not usually result in a substantial transformation. Four of those examples are in conflict with previously announced Customs positions and with existing uniform and established practices.

Customs believes that the criteria set forth in § 12.130, which were derived from previous court decisions and administrative rulings involving substantial transformation determinations, should be used in making country of origin determinations for all Customs purposes, including determinations for purposes of country of origin marking and for assessing duty on imported articles. Accordingly, on August 2, 1985, Customs published a notice in the Federal Register (50 FR 31392), which proposed to conform previous origin determinations for duty and marking purposes with origin determinations being made for quota, visa and export license purposes pursuant to 7 U.S.C. 1854. Public comments were solicited.

The length of time between the notice and the final document is due to the significance of these changes to several segments of the importing public and domestic industry and the considerable interest of Congress and several other Federal agencies in all matters related to textiles. Customs was also expecting that pending legislation might have an impact on applying these changes of practice to the insular possessions. It was not until the passage of the Omnibus Trade and Competitiveness Act of 1988 (Pub. L. 100-418) on August 23, 1988, that Customs concluded that there was no impediment to applying the changes of practice to the insular possessions.

DISCUSSION OF COMMENTS

Thirteen comments were received in response to the notice. All opposed the proposal. A number of the comments dealt with policy and economic considerations which are not considered by Customs in determining whether the proposed changes of practice and position are, as a matter of law, clearly wrong. Therefore, these comments are not discussed in this document.

EFFECT ON INSULAR POSSESSIONS

Most of the comments received were concerned with the effect the proposed changes would have on U.S. insular possessions. Some commenters believe all that is necessary for articles to receive the duty-free status accorded products of insular possessions by General Note 3(a)(iv), Harmonized Tariff Schedule of the United States (HTSUS), formerly General Headnote 3(a), Tariff Schedules of the United States (19 U.S.C. 1202), is for those articles to satisfy the value-content requirement of that headnote. A close reading of General Note 3(a)(iv), however, shows that Congress clearly required, in ad-

dition to a specified value added in the insular possession, that the articles (1) be either the growth or product of the insular possession or (2) be manufactured or produced in the insular possession from materials which were grown, produced, or manufactured in an insular possession or within the customs territory of the U.S., or both. A recent court case, *Yuri Fashions Co., Ltd. v. The United States, et al.*, 632 F. Supp. 41 (CIT 1986), clearly supports this reading of General Note 3(a)(iv). In view of the court's conclusion concerning the application of the headnote and the fact that the court considered most of the same arguments as presented in the comments received by Customs, no further discussion in this area is required.

Two commenters remarked that Customs cannot extend the rules of origin contained in § 12.130 because § 204, Agricultural Act of 1956, which provides the authority for that regulation, is not applicable to the insular possessions.

Customs does not agree. The rules of origin in § 12.130 are derived from the interpretation of judicial decisions and, as such, are required to be applied without regard to which countries, territories, or insular possessions are involved in the processing of an article. The authority of § 204, Agricultural Act of 1956, is not at issue.

The proposed changes do not change General Note 3(a)(iv), as some commenters assert. Rather, the changes are intended to conform origin determinations for tariff purposes for the four described processing operations for which practices or positions are known to exist, to determinations made in accordance with § 12.130. This is accomplished by interpreting the phrase "product of" in the same manner for each tariff-related statute in which that phrase is found.

UNIFORM APPLICATION OF STANDARD

A number of commenters noted that recent court decisions have appeared to hold that the determination of the country of origin of articles depends on the particular statute under which that determination must be made and the intent of Congress in enacting that statute, and, therefore, depending on under which statute a country of origin determination is being based, an article may have more than one country of origin.

Although such an inference may be drawn from language contained in some recent judicial decisions, Customs does not agree that the intended purpose of any of the statutes concerned requires standards to be applied which are different from the standard which Customs now seeks to uniformly apply. Customs also believes that application of the various statutes may not result in an article having more than one country of origin (e.g., for marking, duty or textile restraint purpose) unless that result is explicitly directed by statute.

Unless the courts hold that Customs should not apply the uniform standard in interpreting a particular statute, and that an article is to be considered a product of more than one country, Customs intends to continue its application of an unitary origin standard. Such a result is not only administratively expedient, but is legally required. Certain programs enacted by Congress are clearly intended to encourage investment and job training in lesser developed countries and insular possessions. The intent of such programs would not be accomplished by applying very loose or lenient criteria to country of origin determinations. To do so could result in minimal work or processing done in the beneficiary country, territory, or insular possession and encourage pass-through operations. It would do little to encourage capital investment and industrialization. On the other hand, a more stringent application of country of origin criteria requiring more substantial work or processing in the concerned countries, territories, and insular possessions has the direct effect of encouraging real economic development. The same strict or stringent application of country of origin criteria accomplishes the clear congressional intent of not allowing products of those countries and territories listed in General Note 3(b), HTSUS, to receive the preferential column 1 rates of duty; insures that articles which may be subject to import restrictions are correctly attributed to the allocations of the actual producing country, territory, or possession; and provides authoritative information concerning the true country of origin to the purchaser of imported goods.

One commenter maintained that the extension of § 12.130 "for all purposes" is beyond Customs authority. Another contended that Customs cannot act on this matter while Congress is considering legislation on the same issues.

Customs has been delegated the responsibility of administering and enforcing the tariff laws. To accomplish this, Customs is required to interpret and apply those laws in accordance with accepted rules of statutory construction and pertinent judicial decisions. The subject changes of practices and positions fall within this purview. If Congress should enact legislation in the future which would affect the changes, this does not alter Customs duty to interpret and apply the existing law.

THE "UNIROYAL" TEST

Five commenters stated that Customs interpretation of, and reliance on, *Uniroyal, Inc. v. United States*, 3 CIT 220 (1982), as requiring both a new and different article and a substantial manufacturing or processing operation to constitute a substantial transformation, is incorrect and misplaced.

Uniroyal involved the country of origin marking of shoes further processed in the U.S. from uppers produced in Indonesia. It is Customs view that the decision in *Uniroyal* requires Customs to look at the significance of manufacturing or processing operations per-

formed on an article, as well as the change in the article as a result of those operations. It is this approach to determining the country of origin of merchandise that is embodied in § 12.130. Customs believes that it is required to follow the reasoning of the court in *Uniroyal* in all country of origin determinations.

Some commenters cite the more recent cases of *Belcrest Linens v. United States*, 741 F. 2d 1368 (Fed. Cir. 1984), and *Torrington Co. v. United States*, 764 F. 2d 1563 (Fed. Cir. 1985), as standing for a different principle than *Uniroyal*. Those commenters believe that the only test for substantial transformation is whether a new and different article of commerce results from the manufacturing or processing operation(s) in a second country.

Customs finds nothing in *Belcrest*, *Torrington*, *Uniroyal*, or any other recent court decision on the country of origin of merchandise that requires an approach to determining origin which is at variance with the principles contained in § 12.130. *Belcrest*, which was most often cited by the commenters, involved cutting of fabric into pillowcases, scalloping with colored thread, and stitching along the sides to form the articles. Further, there was evidence, which the court accepted, that the fabric, before cutting, had other commercial uses. In arriving at its decision, the court specifically considered the amount and kind of processing done in the second country and stated the following test:

In determining whether the combining of parts or materials constitutes a substantial transformation, the issue has been the extent of the operations performed *and* whether the parts lose their identity and become an integral part of a new article. [Emphasis added].

In *Torrington*, the court also looked at the operations performed and concluded, "The production of needles from swages is clearly a significant manufacturing process, and not a mere 'pass-through' operation."

In the case of *National Juice Products Association v. United States*, 628 F. Supp. 978 (CIT 1986), the court again considered the amount and kind of processing in determining the country of origin of merchandise.

Considering the process as a whole, the court concludes that Customs could rationally determine that the major part of the end product, when measured by cost, value, or quantity, is manufacturing concentrate and that the processing in the United States is a major manufacturing process.

We find no language which is adverse to our interpretation of *Uniroyal* in *Belcrest* or *National Juice*, both of which cite *Uniroyal* with approval, or in *Torrington*, and no language which is contradictory of the requirement in § 12.130 that a substantial transformation requires both a new and different article of commerce and substantial manufacturing or processing operations. To the contra-

ry, all four cases contain language which clearly supports Customs view that the origin principles found in § 12.130 accurately reflect current applicable law.

RELIANCE ON PRIOR RULINGS

Three commenters mentioned that prior Customs rulings have been relied upon and, therefore, Customs should not change those rulings. While Customs appreciates the predicament some manufacturers, importers and other business persons may face, Congress recognized that Customs may develop practices that, for one reason or another, may be wrong, and authorized Customs to change those practices. To alleviate hardships caused in such situations, § 315(d), Tariff Act of 1930, as amended (19 U.S.C. 1315(d)), requires not less than a 30-day notice before any administrative change in an established and uniform practice resulting in higher rates of duty can take effect. In § 177.10(e), Customs Regulations (19 CFR 177.10(e)), that statutory requirement was expanded to require a 90-day delay after publication in the Federal Register of a final decision changing a practice. Such a final decision is preceded by an initial publication of a notice proposing the change and allowing the public an opportunity to submit comments for consideration before making any such change. Customs believes that it should conform its rulings to judicial decisions and if a practice, position, or ruling exists that is clearly contrary to the law, Customs is required to change that practice, position, or ruling.

One commenter opposed the proposed changes because, among other reasons, each change is concerned with a manufacturing or processing operation that is contended to constitute a substantial transformation. In this regard, Customs is convinced that when all the factors set out in § 12.130 are considered, the majority of the situations now covered by the subject practices or positions would not result in substantial transformation determinations. However, each factual situation will be considered on its own merits and there may be instances where, based on the specific facts presented, articles which presently fall within the subject practices or positions may, using the criteria contained in § 12.130, still be considered substantially transformed.

OTHER COMMENTS

One commenter requested that silk articles be exempted from the proposed changes of practice. In the absence of statutory authority, Customs does not have the discretion to apply a different rule of origin based on the component material in an article. Accordingly, we cannot exempt silk from the proposed change of practice.

Another commenter pointed out that Hong Kong would particularly be affected by the changes in the country of origin for marking purposes; manufacturers would encounter significant problems in order to retain their "Made in Hong Kong" labels; Hong Kong's

marking requirements; have developed in accordance with U.S. requirements; and a change will result in confusion, requiring merchandise to be marked differently for different markets. One commenter noted that some articles from insular possessions will no longer bear the "Made in U.S.A." label. As stated earlier, Customs believes that it should follow the reasoning of the court in *Uniroyal* in all country of origin determinations, including the marking area. Exceptions cannot be made for particular countries, territories or insular possessions.

Another commenter stated that costs should not be determinative. In this regard, it is noted that the value added to an article in a particular country is only one factor to be considered. Customs is of the view that any one or combination of the listed factors, including cost or added value, may be the controlling factor in ascertaining the country of origin of an article.

CHANGE OF PRACTICE

After careful analysis of the comments and further review of the matter, Customs believes the previously announced positions and existing uniform and established practices set forth at the beginning of this document are clearly wrong. Accordingly, the proposed changes are adopted and determinations of the country of origin of merchandise will be consistent with § 12.130, Customs Regulations, for all Customs purposes, including marking and assessment of duties.

EFFECTIVE DATE

The changes in practices and positions will be effective for textiles and textile products entered for consumption on or after 120 days after publication of this document in the Federal Register. This time period will provide affected parties sufficient time to arrange for the proper labelling of textile articles, either in the producing country or while under bond in the U.S., without a disruption of the normal stream of commerce.

DRAFTING INFORMATION

The principal author of this document was Harold M. Singer, Regulations and Disclosure Law Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

CAROL HALLETT,
Commissioner of Customs.

Approved: February 23, 1990.

SALVATORE R. MARTOCHE,
Assistant Secretary of the Treasury.

(T.D. 90-18)

BONDS

APPROVAL TO USE AUTHORIZED FACSIMILE SIGNATURES AND SEAL;
T.D. 87-15 REVOKED AND SUPERSEDED

The use of facsimile signatures and seal on Customs bonds by Washington International Insurance Company was last approved on January 13, 1987, and published as T.D. 87-15.

Washington International Insurance Company has requested a revision of its authorization for use of facsimile signatures and seals on Customs bonds to include only the following persons:

Patricia M. Bonovich, Assistant Secretary and Attorney-In-Fact;
Julia A. Nevittt, Attorney-In-Fact;
Karen Muck, Attorney-In-Fact; and
Lewis M. Moeller, Secretary and Attorney-In-Fact

The surety has provided the Customs Service with a copy of each signature that is to be used, a copy of the corporate seal, and a certified copy of the corporate resolution agreeing to be bound by the facsimile signatures.

Accordingly, effective this date, use of facsimile signatures and seals by the above individuals is approved; T.D. 87-15 is hereby revoked and superseded. The revocation is without prejudice to Customs bonds executed under T.D. 87-15.

The use of facsimile signatures and seals is without prejudice to Washington International Insurance Company's right to affix signatures and seals manually.

Date: February 27, 1990.
File: 221947

JOHN DURANT,
Director,
Commercial Rulings Division.

the first of these is the fact that the population of the country has increased very rapidly since the year 1800. This is due to a variety of causes, but the principal one is the increase in the number of children born to each family.

The second cause is the increase in the number of people who are employed in the manufacturing and commercial industries. This is due to the fact that the demand for goods and services has increased very rapidly, and the only way to meet this demand is by increasing the number of people who are employed in these industries.

The third cause is the increase in the number of people who are employed in the service industries. This is due to the fact that the demand for services has increased very rapidly, and the only way to meet this demand is by increasing the number of people who are employed in these industries.

The fourth cause is the increase in the number of people who are employed in the agricultural industries. This is due to the fact that the demand for food and other agricultural products has increased very rapidly, and the only way to meet this demand is by increasing the number of people who are employed in these industries.

The fifth cause is the increase in the number of people who are employed in the public service industries. This is due to the fact that the demand for public services has increased very rapidly, and the only way to meet this demand is by increasing the number of people who are employed in these industries.

The sixth cause is the increase in the number of people who are employed in the private service industries. This is due to the fact that the demand for private services has increased very rapidly, and the only way to meet this demand is by increasing the number of people who are employed in these industries.

The seventh cause is the increase in the number of people who are employed in the health care industries. This is due to the fact that the demand for health care services has increased very rapidly, and the only way to meet this demand is by increasing the number of people who are employed in these industries.

The eighth cause is the increase in the number of people who are employed in the education industries. This is due to the fact that the demand for education services has increased very rapidly, and the only way to meet this demand is by increasing the number of people who are employed in these industries.

The ninth cause is the increase in the number of people who are employed in the entertainment industries. This is due to the fact that the demand for entertainment services has increased very rapidly, and the only way to meet this demand is by increasing the number of people who are employed in these industries.

The tenth cause is the increase in the number of people who are employed in the transportation industries. This is due to the fact that the demand for transportation services has increased very rapidly, and the only way to meet this demand is by increasing the number of people who are employed in these industries.

The eleventh cause is the increase in the number of people who are employed in the communication industries. This is due to the fact that the demand for communication services has increased very rapidly, and the only way to meet this demand is by increasing the number of people who are employed in these industries.

The twelfth cause is the increase in the number of people who are employed in the information industries. This is due to the fact that the demand for information services has increased very rapidly, and the only way to meet this demand is by increasing the number of people who are employed in these industries.

United States Court of International Trade

One Federal Plaza
New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

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Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo

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United States Court of International Trade

U.S. Court of International Trade
U.S. District Court for the District of Columbia

U.S. District Court for the District of Columbia
U.S. District Court for the District of Columbia

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U.S. District Court for the District of Columbia

Decisions of the United States Court of International Trade

(Slip Op. 90-13)

NORCAL/CROSETTI FOODS, INC., ET AL., PLAINTIFFS V. U.S. CUSTOMS SERVICE,
ET AL., DEFENDANTS

Court No. 89-09-00496

MEMORANDUM OPINION AND ORDER

Plaintiff filed action seeking proper interpretation of 19 U.S.C. § 1304, concerning the conspicuousness of country of origin marking requirements on imported frozen vegetable packaging. The government moves to dismiss for lack of jurisdiction.

Held: The government's motion is denied; jurisdiction in this Court is proper under 28 U.S.C. § 1581(i)(4).

(Decided February 12, 1990)

Titchell, Maltzman, Mark, Bass, Ohleyer & Mishel (Richard D. Maltzman, Robert Ted Parker, and Richard C. Insalaco) for the plaintiff.

Stuart M. Gerson, Assistant Attorney General; *Joseph I. Liebman*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, U.S. Department of Justice (*Susan Burnett Mansfield*) for the defendant.

MUSGRAVE, Judge: This action was originally filed in the United States District Court for the Northern District of California on February 23, 1989. The case was transferred to this Court under a stipulation of transfer on August 30, 1989.¹

In their complaint, Norcal/Crosetti Foods, Inc., Patterson Frozen Food, Inc. and Richard A. Shaw, Inc. (hereinafter "Norcal") claim that the U.S. Customs Service ("Customs") has failed to properly ensure that packaging of imported frozen vegetables exhibits the country of origin marking in a conspicuous place, as required by 19 U.S.C. § 1304² and its implementing regulation, 19 C.F.R. § 134.41(b).³ Having received a negative ruling from Customs con-

¹That stipulation was entered into "without waiver of any objection defendants may have to service, jurisdiction or otherwise." Defendant's Reply at 7.

²§ 1304 **Marking of imported articles and containers.**

Except as hereinafter provided, every article of foreign origin (or its container, as provided in subsection (b) hereof) imported into the United States shall be marked in a conspicuous place as legibly, indelibly and permanently as the nature of the article (or container) will permit in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article.

³§ 134.41 **Methods and manner of marking.**

(b) *Degree of permanence and visibility.* The degree of permanence should be at least sufficient to insure that in any reasonably foreseeable circumstance, the marking shall remain on the article (or its container) until it reaches the ultimate purchaser unless it is deliberately removed. The marking must survive normal distribu-

Continued

cerning the adequacy of country or origin marking requirements, Norcal now seeks a determination by this court regarding the proper interpretation of the above-referenced statute and regulation.

The government opposes jurisdiction in this Court and has moved to dismiss the action, claiming that, although plaintiffs assert this is a marking case, claims that imported merchandise are not properly marked are ultimately claims that the merchandise was not properly classified, and are thus within the province of 19 U.S.C. § 1516.⁴ Because plaintiffs have failed to exhaust their administrative remedies accompanying that code section (see 28 U.S.C. § 2637(b)⁵), they have not met the jurisdictional prerequisites to filing a claim with this Court. Thus, jurisdiction in this Court under 28 U.S.C. § 1581(b)⁶ is alleged to be lacking, and the action, according to the government, should be dismissed.

During oral argument, Norcal invoked jurisdiction in this Court under 28 U.S.C. § 1581(h), or, in the alternative, under § 1581(i)(4). The former statute provides:

(h) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty, *marking*, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters, but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to importation. (Emphasis supplied).

After consideration of the parties' arguments advanced in the pleadings as well as during oral arguments, the Court concludes that the government's position is erroneous. Because jurisdiction under 28 U.S.C. § 1581(h) is lacking, this Court may take jurisdiction pursuant only to the "residual jurisdiction" of 28 U.S.C. § 1581(i)(4)⁷, since the case directly relates to the proper administra-

tion and store handling. *The ultimate purchaser in the United States must be able to find the marking easily and read it without strain.* (Emphasis supplied.)

⁴19 U.S.C. § 1516 provides in pertinent part:

§ 1516 Petitions by domestic interested parties.

(a) Request for classification and rate of duty: petition

(1) The Secretary shall, upon written request by an interested party furnish the classification and rate of duty imposed upon designated imported merchandise of a class or kind manufactured, produced, or sold at wholesale by such interested party. If the interested party believes that *the appraised value, the classification, or rate of duty is not correct*, it may file a petition . . . (emphasis supplied).

⁵(b) A civil action contesting the denial of a petition under section 516 of the Tariff Act of 1930 may be commenced in the Court of International Trade only by a person who has first exhausted the procedures set forth in such section.

⁶(b) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516 of the Tariff Act of 1930.

⁷The statute reads in pertinent part:

(i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for— . . .

(4) administration and enforcement with respect to the matters referred to in . . . subsections (a)-(h) of this section.

tion and enforcement of an international trade law (marking) referred to in 28 U.S.C. § 1581(a)-(h),

Because resort to this Court's residual jurisdiction is not warranted unless one of the more specific provisions of § 1581(a)-(h) does not apply, Norcal's § 1581(h) claim must first be addressed. As the government notes, 28 U.S.C. § 2631(h) limits the ability of prospective plaintiffs to file suit in this Court:

(h) A civil action described in section 1581(h) of this title may be commenced in the Court of International Trade by the person who would have standing to bring a civil action under section 1581(a) of this title *if he imported the goods involved* and filed a protest which was denied, in whole or in part, under section 515 of the Tariff Act of 1930. (Emphasis added.)

The government relies on *U.S. Cane Sugar Refiners Ass'n v. United States*, 698 F. Supp. 266 (CIT 1988) to support their position that because Norcal is not an importer, plaintiffs cannot rely on § 1581(h). In that case, the Court declined to take jurisdiction because "standing * * * challenging a classification ruling⁸ prior to importation is limited in 28 U.S.C. § 2631(h), roughly speaking, to the prospective importer of the goods in dispute." *Id.* at 268, n. 1. Because Norcal is not an importer, 28 U.S.C. § 2631(h) would preclude invocation of 28 U.S.C. § 1581(h) as the proper jurisdictional basis, argues the government.

As the government conveniently overlooked, though, the above-cited language is contained in a *footnote* and has no precedential value. This Court is not constrained to accept dicta as controlling law.

Moreover, the restrictive standing language of § 2631(h) has been broadened by Congress. Although ostensibly limited to importers, § 1581(h) can be utilized by any person *who would have standing* under § 1581(a). Thus, an examination of 19 U.S.C. § 1514(c)(1)(A)-(E), which sets forth the standing requirements for bringing an action under § 1581(a), is necessary:

(1) * * * Except as provided in sections 1485(d) and 1557(b) of this title, protests may be filed with respect to merchandise which is the subject of a decision specified in subsection (a) of this section by—

(A) the importers or consignees shown on the entry papers, or their sureties;

(B) any person paying any charge or exaction;

(C) any person seeking entry or delivery;

(D) any person filing a claim for drawback; or

(E) any authorized agent of any of the persons described in clauses (A) through (D).

⁸§ 2631(h)'s limitation on standing applies to all of the matters listed in § 1581(h), not only classification. Marking is one of those matters.

Thus, invocation of § 1581(a) is not limited only to importers, but allows a variety of persons involved in the disputed import transaction to file a protest.

Furthermore, when the import consists of a raw agricultural product, as do the imports in this case, Congress has allowed a broad interpretation of the term "interested party." In the government's view, 19 U.S.C. § 1516 controls the issue in this case, yet that statute provides:

Any producer of a raw agricultural product who is considered under section 1677(4)(E) of this title to be part of the industry producing a processed agricultural product of the same class or kind as the designated imported merchandise shall, for purposes of this section, be treated as an interested party producing such processed agricultural product.

19 U.S.C. § 1516(a)(3) (emphasis supplied).

In any event, resolution of the standing issue pertaining to § 1581(h) need not be decided because the refusal by Customs to issue the ruling requested by Norcal is *not a protestable event*. Those actions by Customs which can be challenged through the traditional protest route are set out in 19 U.S.C. § 1514 (a)(1)-(7), which reads in pertinent part:

§ 1514 Protests against decisions of appropriate customs officers.

(a) Finality of decisions; return of papers

* * * decisions of the appropriate customs officer, including the legality of all orders and findings entering into the same, as to—

(1) the appraised value of merchandise;
(2) the classification and rate and amount of duties chargeable;

(3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;

(4) the exclusion of merchandise from entry or delivery or a demand for redelivery to customs custody under any provision of the customs law, except a determination appealable under section 1337 of this title;

(5) the liquidation or reliquidation of an entry, or any modification thereof;

(6) the refusal to pay a claim for drawback; and

(7) the refusal to reliquidate an entry under section 1520(c) of this title, shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade * * *

Only if one of these seven events is present can parties invoke jurisdiction under § 1581(a). Since none of these events appear in this case, § 1581(a) cannot apply. Thus, resort to § 1581(h) is not possible since that provision may be invoked only if the plaintiff *could have* filed an action under § 1581(a). Because § 1581(a) can be used only to review a protestable event, and Norcal has nothing to protest, jurisdiction in this Court cannot be asserted under 28 U.S.C. § 1581(h).

Before examining the propriety of jurisdiction under 28 U.S.C. § 1581(i)(4), this Court will dispose of the government's untenable position. Defendant argues that claims by domestic interested parties that merchandise of others was not properly marked are claims that the merchandise was not properly classified and was not assessed at the correct rate of duty. Such claims would properly fall within the purview of 19 U.S.C. § 1516, with jurisdiction in this Court following under § 1581(b). Since Norcal failed to exhaust their mandatory administrative remedies, defendant maintains that the Court lacks jurisdiction.

The government relies on *The Diamond Match Company v. United States*, 49 CCPA 52, C.A.D. 796 (1962), and *Bradford Co., et al. v. American Lithographic Co.*, 12 Ct. Cust. App. 318 (1924) to bolster this truly sweeping pronouncement. In *Diamond Match*, the main issue presented was whether an additional duty should have been assessed by the collector under section 304(c) of the Tariff Act because the imported merchandise was not marked with the country of origin. 49 CCPA at 53. In that case, three motions to dismiss the case were presented to the court as "jurisdictional questions." The first basis for dismissal concerned the plaintiff's challenge to the Secretary of the Treasury's discretion to exempt particular products from the marking requirements under certain conditions. The motion was denied because appellant was seeking to contest the collector's classification of the imported merchandise (a claim legitimately within the court's jurisdictional province), not the authority of the Secretary to make regulations permitting the exception of articles from the marking requirements (an impermissible challenge). *Id.* at 56.

The second ground advocated for dismissal was the failure of the Collector of Customs to comply with the requirements of Section 516(c) of the Tariff Act of 1930, which required that a copy of every appeal and protest filed by an American manufacturer, producer or wholesaler be mailed by the collector to the consignee or agent within five days after the filing thereof. *Id.* at 56. The court affirmed the denial by the Customs Court to dismiss on this basis because the five day period for the Collector's performance was held to be directory. *Id.* at 56. Failure by the collector to act within the proscribed time did not "deprive the plaintiff of its right to have its day in court." *Id.* at 57.

The third ground asserted was the alleged improper signature appearing on the protest. The court declined to overrule the decision of the Customs Court in denying this motion, since the real party in interest was known at all times, despite the inaccuracy of the name used. *Id.*

Having disposed of the jurisdictional challenges, the court turned to an examination of the substantive issue involved: whether paper bands on bundles of 50 spatulas, marked "Made in Japan" would reasonably indicate the country of origin of the spatulas to "ultimate purchasers." *Id.* at 58. The substantive issue presented in this case is closely related: whether obscure country of origin markings on frozen food packages comply with the mandate of 19 U.S.C. § 1340, conspicuously indicating the country of origin of the frozen vegetables to the ultimate purchaser.⁹

Diamond Match does not refer to the government's purportedly "well-settled" generalization that a marking claim is really a request for proper classification and rate of duty. It also defies logic to assert that every marking case is necessarily a claim for proper classification, especially in this context, where plaintiff has simply requested that the country of origin be marked more clearly on the merchandise, and no more. Classification is far removed from the confines of this seemingly straightforward case.

In *Bradford Co., et al. v. American Lithographic Co.*, 12 Ct. Cust. App. 318 (1924), cigar bands were imported from Germany in bundles of 100 each. Around each bundle was a wrapper marked "Made in Germany," but the individual cigar bands were not marked with the country of origin. The collector determined that the merchandise, upon import into the U.S., was properly marked in accordance with section 304(a) of the Tariff Act of 1922 (the predecessor to the present 19 U.S.C. § 1304). He thereupon assessed duties at the appropriate rate provided for such merchandise. *Id.* at 320.

The American manufacturer, American Lithographic Co., filed a protest with the Board of General Appraisers pursuant to section 516(b) of the Tariff Act of 1922 (the forerunner to 19 U.S.C. § 1516(b)). The manufacturer challenged the collector's classification and assessment of imported cigar labels and bands. The Board sustained the protest, finding "that the individual cigar bands and labels were capable of being marked at a negligible cost, without injury, at the time of manufacture, so as to indicate the country of origin; and that section 304(a), *supra*, required such marking of the individual cigar bands and labels." *Id.* at 320.

The Board further held that the determination by the collector that the merchandise was, or was not, lawfully marked, involved classification of the merchandise. *Id.*

⁹Unlike the frozen vegetable packaging, the individual spatulas in *Diamond Match* were not themselves marked with the country of origin. Since the bundles of spatulas reached the ultimate purchasers without the paper bands indicating the country of origin having been broken, the appeals court affirmed the denial of the American manufacturer's protest. *Diamond Match*, 49 CCPA at 59.

The appeals court affirmed the holding of the Board, since the classification of the merchandise was critical to the correct application of section 304(a). Since that provision required that every article be marked in as permanent a manner as the nature of the article would permit, a determination as to what class or group the manufactured article belongs was mandatory. *Id.* at 323. The court found the levy and collection of the additional 10% of the appraised value of the merchandise, provided as a remedy for failure to properly mark, was therefore dependent on the classification as well. *Id.*

Thus, the appeals court concluded, the avenue outlined in section 516(b) extended "to the American manufacturer, producer, or wholesaler the right to protest a classification of imported merchandise of a class and kind manufacturer, produced, or sold at wholesale by him, and the rate of duty assessed thereon, if in his opinion such classification is wrong and the rate of duty assessed improper * * *." *Id.* at 324.

When considered in light of the fact pattern of this case, *Bradford* has little relevance. In the first place, *Bradford* involved the importation of articles which had not been marked at all (as did *Diamond Match*). Here, the articles have been marked, but in a manner that is allegedly not "conspicuous" enough to indicate to the ultimate purchaser the country of origin. The issues are dissimilar.

Second, in *Bradford*, the court reviewed the classification of the imported product because the American manufacturer itself raised the issue: "in the opinion of the American manufacturer, producer, or wholesaler, an improper classification has been made and a wrong rate of duty assessed." *Bradford* at 321. Not only has Norcal not challenged the classification of the imported frozen vegetables, the government has *acknowledged* that this is a case concerning the proper construction of 19 U.S.C. § 1304, and nothing more. Defendant's Memorandum in Support of Motion to Dismiss at 3. *Bradford* is clearly inapposite.

Finally, both *Diamond Match* and *Bradford* were precipitated by the filing of a protest by the plaintiff U.S. manufacturers. As noted earlier, Norcal did not file a protest because this case does not involve a protestable event.

Therefore, the government's vexing assertion that this marking case is, in reality, a classification case, finds scant support in the case law cited. Clearly, no classification issue arises here, and the government's review of the implementing regulations—19 C.F.R. § 175 *et seq.*—which must precede the filing of a § 1516 case do not even merit examination. This is a marking case, and the government's argument about the premature nature of this claim would apply only if Norcal were challenging the classification of the imported merchandise.

During oral argument, the government placed much reliance on *Nat'l Corn Growers Ass'n v. Baker*, 840 F.2d 1547, 1554 (Fed. Cir. 1988) to support its position that § 1516 provides the exclusive rem-

edy for American industry protests. In *Nat'l Corn*, the Court of Appeals for the Federal Circuit reversed Judge Aquilino's ruling that this Court had jurisdiction to hear challenges by domestic producers regarding Customs' alleged unlawful tariff treatment of imported ethanol. Because § 1516 provided an exclusive remedy "for domestic industry injured by competition of imports on which lawful duty was not collected," *id.* at 1551, and that remedy allowed for prospective relief only, *id.* at 1554, the appeals court rejected this Court's assumption of jurisdiction under 28 U.S.C. § 1581(i).

Two factors distinguish *Nat'l Corn's* influence on the outcome of this case. First, appellants in that case (domestic industry) argued that their allegations could not properly be reviewed under § 1516 because their complaints included matters other than rate of duty and classification, *id.* at 1550. Thus, appellants maintained that jurisdiction under § 1581(i) was allowable.

Our appeals court flatly rejected that argument: "[i]t seems obvious to us that the rulings did involve classification and rate of duty." *Id.* at 1551. Since § 1561 provided the exclusive method for American manufacturers' to challenge classification and rate of duty, that provision controlled. In so holding, the Court of Appeals for the Federal Circuit implicitly ruled that if, as domestic industry claimed, the matter at issue involved a subject *other than* classification and rate of duty, jurisdiction in this Court under § 1581(i) might be permissible.

In addition, the legislative history of § 1516 clearly recognizes that the statute was not intended to encompass every conceivable international trade issue that American manufacturers could possibly raise:

Section 516 for the first time recognized that the American producer has an interest in appraisalment and classification of imported merchandise. *It was there provided* that the domestic manufacturer might protest against the appraisalment or classification of merchandise of a class or kind produced by him.

Nat'l Corn at 1553-54 (emphasis supplied), quoting Senate Finance Committee Report to Accompany H.R. 2667, 71st Cong., 1st Sess., Sept. 4, 1929, at 73-74. Thus, only if classification and rate of duty are challenged does § 1516 provide American manufacturers with the proper vehicle to park at this Court's jurisdictional doorstep (via § 1581(b)). Any other matters, unless provided for specifically within § 1581(a)-(h), would have to fall within this Court's residual jurisdiction.

As noted by the government, "[s]ection 1581(i) jurisdiction may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate." *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987). The subsection

claimed by Norcal, 1581(h), cannot apply here since the action taken by Customs does not constitute a protestable event.

Since no other subsection of § 1581 would allow plaintiff to invoke this Court's jurisdiction, reliance on the broad residual jurisdiction of the Court is warranted. Because Norcal seeks enforcement of the marking statute, 19 U.S.C. § 1304, and marking is a matter referred to in § 1581(h), this Court has jurisdiction under § 1581(i)(4). This case concerns administration and enforcement of the international trade laws mentioned in § 1581(a)-(h), and is properly within the jurisdictional boundaries of this Court.

The only remaining question is whether Norcal has standing to bring this action under the Court's residual jurisdiction. 28 U.S.C. § 2631(i) provides:

(i) Any civil action of which the Court of International Trade has jurisdiction, other than an action specified in subsections (a)-(h) of this section, may be commenced in the court by any person adversely affected or aggrieved by agency action within the meaning of section 702 of title 5.

Because plaintiff has plead and appears to have sustained actual injury, thereby suffering a legal wrong under the standard set forth in the Administrative Procedure Act,¹⁰ Norcal indeed has standing to bring an action under 28 U.S.C. § 1581(i)(4).

Therefore, because this Court has jurisdiction to consider Norcal's claim, the motion to dismiss is denied and the government is ordered to submit their answer to plaintiff's complaint within thirty calendar days of the date of this memorandum opinion.

(Slip Op. 90-14)

APPLE COMPUTER, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 86-01-00125

MEMORANDUM OPINION AND ORDER

The Customs Service classified "x-y plotters" as "[d]rafting . . . machines," under item 710.80, TSUS, and plotter pens as "[m]arking pens having a wick-like tip of felt or other material," under item 760.15, TSUS. Plaintiff protests these classifications and contends that the plotters are properly classifiable as "[o]ffice machines not specially provided for," under item 676.30, TSUS, and the plotter pens are properly classifiable as "[p]arts of automatic data-processing machines and units thereof," under item 676.52, TSUS. Alternatively, plaintiff contends that if the court determines that the plotters were properly classified by Customs, then the plotter pens are properly classifiable as parts of drafting machines, under item 710.80, TSUS.

¹⁰§ 702 Right of review.

A person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof * * *

Held: As for the plotters, plaintiff has rebutted the presumption of correctness that attaches to the classification by Customs, and the plotters are properly classifiable as "[o]ffice machines not specially provided for," under item 676.30, TSUS. As for the plotter pens, they were properly classified by the Customs Service as "[m]arking pens having a wick-like tip of felt or other material," under item 760.15, TSUS.

[Judgment for plaintiff in part; judgment for defendant in part.]

(Dated February 13, 1990)

Baker & McKenzie (Bruce H. Jackson and Jay C. Clemens), for plaintiff.

Stuart M. Gerson, Assistant Attorney General; Joseph I. Liebman, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (Al J. Daniel, Jr.), for defendant.

Re, Chief Judge: The question presented in this case pertains to the proper classification, for customs duty purposes, of certain merchandise imported from Japan and described on the Customs invoices as "x-y plotters" and "plotter pen kits."

The plotters entered at the port of Oakland, California, in 1983 and 1984, and were classified by the Customs Service as "[d]rafting * * * machines," under item 710.80 of the Tariff Schedules of the United States (TSUS), with duty assessed at the rate provided for at the time of entry. The plotter pens entered at the port of San Francisco, California, in 1983 and 1984, and were classified by the Customs Service as "[m]arking pens having a wick-like tip of felt or other material," under item 760.15, TSUS, with duty assessed at the rate provided for at the time of entry.

Plaintiff protests these classifications, and contends that the plotters are properly classifiable as "[o]ffice machines not specially provided for," under item 676.30, TSUS, with duty at the rate provided for at the time of entry. Plaintiff also contends that the plotter pens are properly classifiable as "[p]arts of automatic data-processing machines and units thereof," under item 676.52 TSUS, with duty at the rate provided for at the time of entry. Alternatively, plaintiff contends that if the court determines that the plotters were properly classified by the Customs Service as "[d]rafting * * * machines," under item 710.80, TSUS, then the plotter pens are properly classifiable as parts of drafting machines, under item 710.80, TSUS.

The pertinent statutory provisions of the Tariff Schedules are as follows:

Plotters Classified Under:

Schedule 7, Part 2, Subpart C:

Drafting machines, compasses, dividers, ruling pens, lettering pens (including fountain-pen type) used by draftsmen, pantographs, drawing curves, rulers, scribes, straight edges, disc calculators, slide rules, and other instruments, all the foregoing which are drawing, marking-out or mathematical calculating instruments; hand styluses; micrometers, calipers, gauges, balancing machines, and non-optical measuring or checking instruments, apparatus, and machines not specially provided for; and parts of the foregoing articles:

* * * * *

Other:

- 710.80 Drafting and drawing machines, instruments, and apparatus, and parts thereof 6.2% *ad val.* (1983)
5.9% *ad val.* (1984)

Plotters Claimed Under:

Schedule 6, Part 4, Subpart G:

- 676.30 Office machines not specially provided for 4.4% *ad val.* (1983)
4.2% *ad val.* (1984)

Plotter Pens Classified Under:

Schedule 7, Part 10:

- 760.15 Marking pens having a wick-like tip of felt or other material 14.0% *ad val.* (1983)
12.5% *ad val.* (1984)

Plotter Pens Claimed Under:

Schedule 6, Part 4, Subpart G:

Parts of the foregoing:

* * * * *

Other:

* * * * *

- 676.52 Parts of automatic data-processing machines and units thereof 4.7% *ad val.* (1983)
4.5% *ad val.* (1984)

Plotter Pens Alternatively Claimed Under:

Schedule 7, Part 2, Subpart C:

Drafting machines, compasses, dividers, ruling pens, lettering pens (including fountain-pen type) used by draftsmen, pantographs, drawing curves, rulers, scribes, straight edges, disc calculators, slide rules, and other instruments, all the foregoing which are drawing, marking-out or mathematical calculating instruments; hand styluses; micrometers, calipers, gauges, balancing machines, and non-optical measuring or checking instruments, apparatus, and machines not specially provide for; and parts of the foregoing articles:

* * * * *

Other:

- 710.80 Drafting and drawing machines, instruments, and apparatus, and parts thereof 6.2% *ad val.* (1983)
5.9% *ad val.* (1984)

Two questions are presented: first, whether the imported plotters have been properly classified by Customs as "[d]rafting * * * machines," under item 710.80, TSUS, or whether they are properly classifiable as "[o]ffice machines not specially provided for," under item 676.30, TSUS, as claimed by plaintiff; second, whether the imported plotter pens have been properly classified by Customs as "[m]arking pens having a wick-like tip of felt or other material," under item 760.15, TSUS, or whether they are properly classifiable as "[p]arts of automatic data-processing machines and units thereof," under item 676.52, TSUS, as claimed by plaintiff.

Alternatively, if the court determines that the plotters have been properly classified as "[d]rafting * * * machines," under item 710.80, TSUS, the question presented is whether the plotter pens are properly classifiable as parts of drafting machines, under item 710.80, TSUS, as maintained by plaintiff.

In order to decide these questions, the court must consider "whether the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878, *reh'g denied*, 739 F.2d 628 (Fed. Cir. 1984). Pursuant to 28 U.S.C. § 2639(a)(1) (1982), the government's classification is presumed to be correct, and the burden of proof is upon the party challenging the classification.

After an examination of the merchandise, the pertinent tariff items, relevant case law and the testimony of record, it is the determination of the court that, as to the x-y plotters, plaintiff has overcome the presumption of correctness that attaches to the classification by Customs. Since the plotters are properly classifiable as "[o]ffice machines not specially provided for," under item 676.30, TSUS, plaintiff's protest is sustained.

As to the plotter pens, it is the determination of the court that plaintiff has not overcome the presumption of correctness that attaches to the classification by Customs, and that the plotter pens were properly classified by Customs as "[m]arking pens having a wick-like tip of felt or other material," under item 760.15, TSUS.

THE PLOTTERS

At trial, in support of its contentions, plaintiff presented the testimony of Mr. Phillip C. Williams, the manager of plaintiff's Developer Technical Support Group. Mr. Williams testified that, prior to his present position with plaintiff, he served as the interface engineering manager of plaintiff's "peripherals" group. Mr. Williams stated that, in this capacity, it was his "responsibility to ensure that the Apple Color Plotter was, one, designed and, two, introduced in the marketplace as a peripheral product that would attach to both the Apple II and Apple III [computers]." He testified that the plotter:

makes its pictures or follows what the computer tells it to do by simply attaching points together as you might with, say, taking a ruler and laying it down and drawing a line between those. If you have a starting point and an ending point, and draw a line between those two, that is substantially what the plotter does.

Mr. Williams stated that the plotter "[ha]s a number of similar characteristics" with a typical computer dot matrix printer. He explained that:

[t]he head of the plotter, namely the area where the paper is loaded, is very similar, in that it has a roller drum which is similar to the printer, in that the paper rolls around a drum. The head, itself, is a carrier of marking capability, in that it moves back and forth across a page * * *. The controls, the power switch, all that sort of thing, I think go without saying as similar types of devices. It does have a roller wheel adjustment on the side of the plotter which is similar to the roller adjuster on the printer[,] [a]nd * * * the marking characteristic capability is very similar, in that we're essentially attaching or impressing paper with ink * * * from the device.

In addition, he noted that "both of these devices * * * are serial devices—which means that information is sent one piece at a time across a pair of wires * * *. The same cable would be used to connect from [a] computer to either one of those two devices * * *." Mr. Williams also stated that the plotter and the dot matrix printer "differ greatly in resolution." He explained that the plotter is "a much higher resolution device in terms of its accuracy * * *."

Mr. Williams stated that plaintiff marketed its plotter principally for use in businesses, to "create overhead transparencies for use in business presentations," and in educational institutions, for "the teaching of children as to how a device would move around in an X,Y plane." Mr. Williams testified that plaintiff had not "very specifically thought of drafting as a true market for th[e] [plotter], given its size limitations and also its speed limitations." He stated that he had no knowledge of any draftsmen or engineers ever purchasing the plotter for use in their profession.

Mr. Williams also testified about computer-aided design (CAD) and computer-aided manufacturing (CAM) systems, which were available at the time of the introduction of the plotter. He explained that:

[CAD] allowed the individual to do the design in the computer and, then, using the computer's capability, the memory and the speed of the processor, to change that design on the screen, which afforded tremendous leverage in terms of the speed, one, and also the cost associated with the designs themselves. And in the [CAM] area, essentially all of the design characteristics of a particular design that a drafts person would come up with could be translated into manufacturing terms—meaning that I could design a widget or a bolt or a screw, or whatever it was

on the screen, specify all of its dimensions, material, and so on, and those terms would then be translated into manufacturing terminology * * *.

Mr. Williams was asked to "compare the products that you were aware of that were being used to create hard copy in the CAD arena with the Apple Color Plotter[.]" He replied that "[m]ost of the output in a CAD environment requires the use of a much larger plotter[.]" with the capacity to produce larger copies of designs than those that could be produced with the Apple plotter. In addition, he stated that the speed of the Hewlett Packard plotter, which was frequently used in CAD and CAM systems, "was approximately ten times that of the Apple Color Plotter." He also stated that typical CAD and CAM output devices had resolution of "one-thousandth of an inch." Mr. Williams stated that, in contrast, the Apple plotter had "approximately four-thousandths of an inch" resolution.

Mr. Williams testified that, in the course of his high school education, he had experience with drafting. He described "drafting" as "[t]he putting of paper and pencil together in such a way that you create some sort of drawing that is meaningful. For example, pictures of a house or articles or electronic circuitry that's depicted on paper * * *." Mr. Williams testified that, during his education, he had used "drafting machines."

In the course of his testimony, Mr. Williams viewed three pamphlets, which were introduced into evidence by plaintiff. The pamphlets contained pictures and descriptions of devices attached to drawing boards. The devices consisted of movable metal structures containing a pair of rulers at right angles. Mr. Williams stated that "[i]n all three instances, even though they are * * * three different models, they are all drafting machines of the type that I used in high school."

Mr. Williams explained that a "drafting machine":

is what we would call an extention to the average T-square—which was basically two blocks of wood that were affixed perpendicular to one another. This is a mechanical devise that was affixed to a drawing board and allowed the designer to quickly move around on the drawing board and create lines, both vertical and horizontal, as well as being able to create lines that were at angles to the page as well.

Plaintiff also presented a definition of "drafting machine" as "[a] mechanical device to aid in drafting, having two straight edges fixed perpendicularly to each other." *McGraw-Hill Dictionary of Scientific and Technical Terms* 488 (3rd ed. 1984). Mr. Williams testified that this is "an accurate description" of a "drafting machine." He further stated that, to the best of his knowledge, the plotter is not "known commercially" as a "drafting and drawing machine."

On cross examination, Mr. Williams was shown the manual for the Apple plotter. The manual contained a list of drawings that could be made with the plotter, including "Engineering drawings," "Logic diagrams," "Architectural details," and "Circuit diagrams." Mr. Williams identified these drawings as the type of drawings he had done in a drafting course, as part of his high school education. He admitted that the final product of CAD systems "serve the same function to an engineer or for an architect as drawings created by hand with [the type of drafting machine he had used at school]."

Mr. Williams was also questioned about a CAD program called CADAPPLE, which was designed for use with Apple computers. He stated that "I don't recall ever having seen [CADAPPLE] working with the Apple Color Plotter." He admitted, however, that an appropriate CAD program could be used, with the Apple Color Plotter, "to teach students how to do engineering drawings using CAD techniques and programs[.]"

Plaintiff's second witness was Mr. Gary L. Fulcher, president of "Brighter Images," a firm that sells CAD and CAM equipment. Mr. Fulcher testified about the typical use of a CAD system. He explained that usually "[t]he operator would draw * * * on the computer system, and dimension on the computer system, and * * * make changes to the drawing on the computer system, and then would plot it out to some type of a peripheral device, and usually those peripheral devices were plotters." In response to questioning, Mr. Fulcher agreed that he was "knowledgeable regarding the various [types] of CAD software and hardware that was in the market * * *."

Mr. Fulcher noted that the Apple x-y plotter was "not a product that would have been of much interest to us." He explained that the Apple plotter had "three problems: to[o] small, number one; number two, it's too slow; number three, it's * * * resolution is * * * pretty poor for commercial quality drawings." Mr. Fulcher stated that he had never seen the Apple plotter used in "commercial applications," and that he would not recommend it for commercial use.

Mr. Fulcher testified that he had studied "mechanical drafting, in both high school and in college." He stated that, during his drafting education, he had used the "[s]ame equipment that Mr. Williams used." He identified the instruments in the pamphlets introduced at trial as "drafting machines."

The government, in support of its contention that the imported plotters were properly classified by Customs, introduced the testimony of Mr. Christopher M. Stammen, the director of Development for Computer-aided Drafting Products of Versacad Corporation. The Versacad Corporation sells CAD software. Mr. Stammen, the co-author of a book entitled "CAD Principles and Applications," was qualified "as an expert in programming and CAD software and related equipment used for drafting, including the X,Y plotters."

Mr. Stammen testified that, initially, the CADAPPLE program was not compatible with the Apple plotter. He testified, however, that he devised a "driver," which "converts movement commands [from the CADAPPLE program] to draw lines and arcs into specific Apple Color Plotter commands." Mr. Stammen stated that:

[i]n my particular work, I would have to have the technical manuals to the plotter in order to write a driver for the * * * CADAPPLE software. I would study the manuals and find the appropriate commands that our CAD software could use to direct it to draw an engineering drawing.

Mr. Stammen testified that CADAPPLE was used by "people dabbling in CAD * * *; small firms who are actually using the CADAPPLE package to do things such as printed circuit board design and layout, small schematic diagrams, fairly simple mechanical drawings." He viewed a promotional mailing to educators, which suggested purchase of the Apple plotter for use with CADAPPLE software.

As part of his testimony, Mr. Stammen demonstrated the use of the Apple plotter with the CADAPPLE software. Using the Apple plotter, Mr. Stammen created a diagram similar to diagrams he had created in a drafting course he had taken as part of his education. Mr. Stammen also observed a set of drafting tools that he had used during his drafting course. He identified several tools which he could use to produce a diagram similar to the one he had made using the Apple plotter.

The government introduced a definition of "drafting" as:

the act of delineating a drawing of an object, its structure, or its parts in the graphic language universally employed to communicate the engineering intent of a design, or problem. Engineering drawings consist of lines representing surfaces, edges, and contours of objects, supplemented by symbols, dimensional sizes, and notes. In a broad sense, drafting is the graphical development of an engineering problem or record.

5 *The New Encyclopedia Britannica* 973 (15th ed. 1984). Mr. Stammen agreed with this definition of drafting, and agreed "that what the [Apple] plotter does or creates is a product of drafting[.]" He also stated that, in his opinion, the Apple plotter fell within the language of item 710.80, TSUS.

Plaintiff contends that "the plotters are not classifiable as 'drafting machines' under the *eo nomine* designation for such articles in item 710.80." In support of its contention, plaintiff stressed that "the plotters are not known as 'drafting machines,'" and "do not have the same primary design, construction and function as drafting machines." In contrast, the government contends that the plotters were properly classified as "drafting machines," "because the evidence demonstrates that [they are] machine[s] which [are] an aid to the human creation of mechanical drawings, such as those made

by other machines and instruments enumerated in item 710.80, by the manipulation of pens and paper."

In customs law, it is clear that "[t]he meaning of an *eo nomine* designation is determined as of the time of enactment of the tariff act." *Sears, Robuck and Co. v. United States*, 46 CCPA 79, 82, C.A.D. 701 (1959). However, while "the meaning of the said designation is thus fixed, that meaning will be held to embrace all articles subsequently created which come within its scope." *Id.* It is also well established that "an *eo nomine* designation includes all forms of the article." *Channel Master, Div. of Avent, Inc. v. United States*, 10 CTT 684, 686, 648 F. Supp. 10, 13 (1986), *aff'd*, 856 F.2d 177 (Fed. Cir. 1988).

In *Davies Turner & Co. v. United States*, 37 Cust. Ct. 344, 344, Abs. 60191 (1956), *rev'd*, 45 CCPA 39, C.A.D. 669 (1957), the imported merchandise consisted of various types of furniture "bent to shape by the use of machinery." The merchandise was classified by the Customs Service as "bent-wood furniture," under paragraph 412 of the Tariff Act of 1930, as modified. Plaintiff protested the classification, and contended that the merchandise was properly classifiable under provisions for furniture, not specially provided for, under the Tariff Act of 1930.

In *Davies Turner*, the Customs Court established:

that, at the time of passage of the Tariff Act of 1930, merchandise such as that in issue, bent by the laminating process, was not known to the trade and commerce of this country; that at the time the common meaning of the term "bent-wood" had application to furniture made of solid, as distinguished from laminated, wood parts, which were bent by steam or hot water * * *.

37 Cust. Ct. at 345. The Customs Court denied plaintiff's protest, and stated that the Act "do[es] not limit the terms 'bent-wood' or 'bent-wood furniture' to articles, the parts or members of which are of solid wood made pliable by steam or hot water." *Id.* at 346.

On appeal, the Court of Customs and Patent Appeals reversed, and stated that "[t]he meaning of *eo nomine* provisions is to be determined as of the date of enactment but, when so determined, that meaning will embrace all subsequently created articles which fall within it." 45 CCPA at 41. The appellate court noted that "the meaning of words used in [tariff] acts is fixed at the time of enactment and does not fluctuate as the meaning of words might subsequently vary." *Id.* at 42. In holding that the laminated bent-wood furniture was not properly classifiable as "bent-wood furniture" under the Tariff Act of 1930, the court observed that:

we fear we would be ignoring, or at least weakening, the well established doctrine that tariff acts are to be interpreted in light of their meaning at the time of their enactment, if we were to sustain the conclusion below that subsequent changes in meaning of the language used in tariff acts are to prevail in the judicial process of ascertaining Congressional intent.

Id. at 43.

In restating the principle, Chief Judge Markey noted that "tariff terms can be expected to encompass merchandise not known to commerce at the time of their enactment, provided the new article possesses an *essential resemblance* to the one named in the statute." *United States v. Standard Surplus Sales, Inc.*, 69 CCPA 34, 38, 667 F.2d 1011, 1014 (1981) (emphasis added) (citing *Smillie & Co. v. United States*, 12 Ct. Cust. Appls. 365, 367, T.D. 40520 (1924)). See also *Belfont Sales Corp. v. United States*, 11 CIT 541, 545, 666 F. Supp. 1568, 1571 (1987), *aff'd*, 878 F.2d 1413 (Fed. Cir. 1989); *Bar Zel Expeditors, Inc. v. United States*, 3 CIT 84, 101, 544 F. Supp. 868, 881 (1982), *aff'd*, 698 F.2d 1210 (Fed. Cir. 1983). In the present case, the Customs Service classified the imported plotters as "drafting machines." Hence, the court must ascertain and determine whether the Apple plotters bear an "essential resemblance" to the "drafting machines" which existed at the time of the enactment of the TSUS.

In determining whether merchandise invented or that has come into being after the enactment of a tariff act bears an "essential resemblance" to an *eo nomine* item, the courts have looked to similarities in construction, function, or use. See *Standard Surplus Sales*, 69 CCPA at 38-40, 667 F.2d at 1014-1015. It is plain that the imported merchandise bears no similarity in construction to the traditional "drafting machine" described at trial.

The testimony at trial indicated clearly that a traditional "drafting machine," as testified by Mr. Williams, is "a mechanical device that was affixed to a drawing board and allowed the designer to quickly move around on the drawing board and create lines, both vertical and horizontal, as well as being able to create lines that were at angles to the page as well." This description was corroborated by the pamphlets introduced by plaintiff and which were identified by both of plaintiff's witnesses as pictures and descriptions of "drafting machines." In addition, a "drafting machine" was defined as "[a] mechanical device to aid in drafting, having two straight edges fixed perpendicularly to each other." *McGraw-Hill Dictionary of Scientific and Technical Terms* 488 (3rd ed. 1984). Although the government's expert, Mr. Stammen, described the Apple plotter as a "drawing machine," it is important to note that none of the witnesses at trial identified the plotter as a "drafting machine."

It is often stated that, in customs classification cases, "samples of the merchandise may be 'potent' witnesses." *Permargrain Prods, Inc. v. United States*, 9 CIT 426, 429, 623 F. Supp. 1246, 1249 (1985) (citing *Marshall Field & Co. v. United States*, 45 CCPA 72, 81, C.A.D. 676 (1958)), *aff'd*, 791 F.2d 914 (Fed. Cir. 1986). In contrast to the mechanical devices defined at trial as "drafting machines," the Apple plotters bear a strong physical resemblance to computer dot matrix printers. In his testimony, Mr. Williams indicated several similarities of the Apple plotter and dot matrix computer printers. More specifically, Mr. Williams identified or described the Apple plotter as an "output device." Mr. Stammen admitted, on cross ex-

amination, that, in his firm's literature on the CADAPPLE, plotters and dot matrix printers are identified as "output devices."

Furthermore, the function or use of the Apple plotter differs from the use of traditional "drafting machines." The testimony at trial established that, in using traditional drafting machines, the designer writes by hand on paper placed on a drawing board. In contrast, Mr. Fulcher testified as to the use of plotters with CAD systems, "[t]he operator would draw * * * on the computer system, and dimension on the computer system, and * * * make changes to the drawing on the computer system, and then would plot it out to * * * [a] plotter[]." Mr. Fulcher's testimony was corroborated by the demonstrations at trial by Mr. Williams and Mr. Stammen of the use of the plotter. From the testimony of all the witnesses, it is clear that, while traditional "drafting machines" are used by designers to assist in the creation of hand drawn designs, the Apple plotter serves as a printer for designs created by the designer on a computer. Hence, the Apple plotter and traditional drafting machines have clearly different functions or uses.

In addition, under well established principles of statutory interpretation, it is clear that the Apple plotters are not properly classifiable as "[d]rafting * * * machines," under item 710.80, TSUS. The doctrine of *noscitur a sociis*, i.e., known by its associates, "teach[es] that the meaning of a word may be known or revealed by the words with which it is accompanied or associated." *Economy Cover Corp. v. United States*, 76 Cust. Ct. 130, 132, C.D. 4645, 411 F. Supp. 783, 784 (1976). In the heading to item 710.80, TSUS, the term "drafting machines" is followed by "compasses, dividers, ruling pens, lettering pens (including fountain-pen type) used by draftsmen, pantographs, drawing curves, rulers, scribes, straight edges, disc calculators, slide rules, and other instruments, all the foregoing which are drawing, marking-out or mathematical calculating instruments; * * *." The devices listed after "drafting machines" in item 710.80 consist of hand held instruments used in conjunction with the traditional "drafting machines" described at trial, to create designs. Referring to his experiences in drafting as part of his education, Mr. Williams stated that "[c]ompasses were used; dividers were used; ruling pens; lettering pens * * *." Drawing curves certainly were used. Rulers; scribes; straight edges. Slide rules and some of the things down at the bottom; micrometers, calipers, gauges, et cetera, virtually all of them were used in some way." From the demonstrations at trial, it is clear that these devices would serve no purpose in the creation of a design using the Apple plotter.

Plaintiff contends that the Apple plotters are properly classifiable as "[o]ffice machines not specially provided for," under item 676.30, TSUS, "because they are output devices designed for use with computers." In support of its contention, plaintiff cites *Data Prods. Corp. v. United States*, 4 CIT 234, 558 F. Supp. 124 (1982).

In *Data Products*, the imported merchandise consisted of parts of line printers, "machine[s] which permit[] high speed production of typed matter * * * from computer data sources." 4 CIT at 236, 558 F. Supp. at 126. The merchandise was classified by the Customs Service under item 676.52, TSUS, as parts of office machines. Plaintiff protested the classification and contended that the imported merchandise is properly classifiable under item 668.50, TSUS, as other parts of printing machinery.

The court, in *Data Products*, found "that the sole function of a line printer is to print matter." *Id.* at 237, 558 F. Supp. at 126. The court also found that line printers "are invariably utilized in conjunction with data processing equipment and are, therefore, distinguishable from printing machinery which is used primarily in the graphic arts." *Id.* at 237, 558 F. Supp. at 127. The court determined that "[l]ine printers are thus clearly equipment used peripherally to data processing machines." *Id.* at 239, 558 F. Supp. at 128. Hence, the court held that, since data processing machines are properly classified as office machines, "the importations were properly classified as parts of office machines under item 676.51." *Id.*

In the present case, the testimony at trial indicates certain similarities between the Apple plotters and dot matrix printers similar to the line printers in *Data Products*. The demonstrations of Mr. Williams and Mr. Stammen indicate that, like the line printers, the Apple plotter can only be used in conjunction with a computer. Both devices serve to print designs or information entered into a computer. As Mr. Williams stated during the course of his demonstration, "[t]he plotter's not doing anything more than reacting to a whole series of * * * commands." Mr. Williams also identified both the Apple plotter and dot matrix printers as "serial devices," and indicated several similarities in design and construction.

Furthermore, headnote 2(a) to schedule 6, part 4, subpart 6, of the TSUS, defines "office machines" as:

machines which are used in offices, shops, factories, workshops, schools, depots, hotels, and elsewhere, for doing work concerning the writing, recording, sorting, filing, mailing of correspondence, records, accounts, forms, etc., or for doing other "office work", and which have a base for fixing or placing them on a table, desk, wall, floor, or similar place * * *.

The demonstration of Mr. Williams indicated that the Apple plotter can be used to create various types of documents, including graphs or charts. It is clear that these graphs or charts could serve as "correspondence, records, accounts, forms, * * * or * * * other 'office work.'" In addition, the Apple plotter has a base, and can easily be "fix[ed] or plac[ed] * * * on a table, desk, wall, floor, or similar place * * *."

On the record before the court, as to the x-y plotters, it is the holding of the court that plaintiff has overcome the presumption of correctness that attaches to the classification by Customs, and that

the imported "x-y plotters" are properly classifiable as "[o]ffice machines not specially provided for," under item 676.30, TSUS.

THE PLOTTER PENS

Plaintiff introduced at trial a sample of the plotter pens. The pens consist of a small carousel with a rotating head containing four colored tips of felt or a felt-like material. The tips extend from an 11-sided insert that fits into the carousel. When moved across paper, the tips produce lines of ink. Their small size and odd shape, however, render them almost useless for purposes of writing by hand.

Mr. Williams testified that the plotter pens had been designed specifically to function or work with the Apple plotter. He stated that the plotter pens "are unique in the market and cannot be used, by legal agreement with [the manufacturer], on any other plotter in the world." According to Mr. Williams, the pens and carousel "kind of looks like a spaceship."

Plaintiff contends that the plotter pens are not classifiable as "[m]arking pens having a wick-like tip of felt or other material," under item 760.15, TSUS, "because they are 'more than' marking pens." Plaintiff asserts that the plotter pens are properly classifiable as "[p]arts of automatic data-processing machines and units thereof," under item 676.52, TSUS. In contrast, defendant contends that the plotter pens were properly classified by Customs, "because the evidence demonstrates that they are pens which have such tips * * *."

Under General Interpretative Rule 10(ij), "a provision for 'parts' of an article covers a product solely or chiefly used as a part of such article, but does not prevail over a specific provision for such part." It is not seriously disputed that the imported plotter pens were solely used as parts for the Apple plotter. Hence, the question presented is whether the plotter pens are more specifically provided for by item 760.15, TSUS, as "[m]arking pens having a wick-like tip of felt or other material."

In support of its contention, plaintiff cites *Kores Mfg. Corp. v. United States*, 3 CIT 178, 545 F. Supp. 1303 (1982). In *Kores*, the imported merchandise consisted of certain film ribbons for word processing machines. The film ribbons were classified by Customs "as other articles not specially provided for, of textile materials under item 389.62 [, TSUS.]" *Id.* at 179, 545 F. Supp. at 1304. Plaintiff protested the classification, and contended that the film ribbons "should have been classified as other articles not specially provided for of plastics under item 774.60, TSUS, * * * [or] under item 676.52, TSUS, as other parts of office machines * * *." *Id.* In addition, the government "submit[ted] as an alternative claim for classification as parts of typewriters, under item 676.50, TSUS * * *."

The court in *Kores* determined that the film ribbons were in chief value of plastic, not of textiles. See *id.* at 188, 545 F. Supp. at 1310. The question presented in *Kores*, was "whether the imported articles are more specifically provided for as claimed by plaintiff as articles not specially provided for of rubber or plastic, or as other parts of office machines under item 676.52, TSUS, or under defendant's alternative claim under item 676.50 as typewriter parts." *Id.* at 188, 545 F. Supp. at 1310-11.

In *Kores*, the court observed that "[t]he record is replete with facts establishing the imported film ribbons are used exclusively in office machines known as printers." *Id.* at 189, 545 F. Supp. at 1312. The court also found that "even though the merchandise may resemble a typewriter ribbon, they are more durable, efficient and suited only to the demands of high velocity printers used in word processing machines." *Id.* at 190, 545 F. Supp. at 1312. Hence, the court determined that the imported film ribbons "are unmistakably more than typewriter ribbons * * *." *Id.* at 190, 545 F. Supp. at 1312 (emphasis added). The court sustained plaintiff's protest, and held that the imported film ribbons are properly classifiable as parts of office machines, under item 676.52, TSUS.

In this case, plaintiff asserts that "[l]ike the film ribbons in *Kores*, the Pens are 'more than' marking pens because of their special design, construction, efficiency and use." In determining whether the plotter pens are "more than" pens, "it is necessary to determine the meaning of the tariff provision involved and compare it with the merchandise in issue." *Phone-Mate, Inc. v. United States*, 12 CIT —, 690 F. Supp. 1048, 1053 (1988), *aff'd*, 867 F.2d 1404 (Fed. Cir. 1989).

In customs law, "the common meaning of a tariff term is a question of law and * * * the court may consult dictionaries, scientific authorities, and other reliable information sources to ascertain that common meaning." *C.J. Tower & Sons, Inc. v. United States*, 69 CCPA 128, 133, 673 F.2d 1268, 1271 (1982). Neither party has presented any lexicographic definitions of "pen." The court, however, has found several definitions which are helpful in determining the Congressional intent behind item 760.15, TSUS.

A "pen" has been defined as "any instrument for writing with ink * * *." *The New Century Dictionary of the English Language* 1273 (1946). It has also been defined as "an implement for writing or drawing with ink or a similar fluid * * *." *Webster's Third New International Dictionary* 1668 (1961). Moreover, "to write" has been defined as "to draw or form by or as if by scoring or incising a surface[.] * * *." *Webster's Third New International Dictionary* at 2640, and "to draw" has been defined as "to produce by or as if by tracing a pen or other instrument of delineation over a surface * * *." *Id.* at 686. According to the Customs Court, a "ball-point pen" is "'any writing instrument of the type having a reservoir, cartridge, or magazine containing a writing compound or fluid that is fed to a

ball type writing device when the instrument is in use.' " *Night-writer Corp. v. United States*, 69 Cust. Ct. 191, 194, C.D. 4393 (1972) (quoting 25 Fed. Reg. 1,777 (March 1, 1960)).

None of the definitions of pen require that the device be able to be grasped by hand to be used to write. Furthermore, the definitions of "to write" and "to draw" do not require action by hand. Hence, the imported plotter pens, despite the fact that they are not suitable for writing by hand, come within the common meaning of "pens."

In addition, it is important to note that item 760.15, TSUS, for "[m]arking pens having a wick-like tip of felt or other material," is an *eo nomine* designation. It cannot be questioned that "an *eo nomine* designation includes all forms of the article." *Channel Master, Div. of Avnet, Inc. v. United States*, 10 CIT 684, 686, 648 F. Supp. 10, 13 (1986), *aff'd*, 856 F.2d 177 (Fed. Cir. 1988).

Although the plotter pens do not resemble typical pens, and are not suitable for writing by hand, it cannot be disputed that they serve the same purpose as typical pens, in that they permit the creation of lines of ink on paper. Hence, the plotter pens are not "more than" pens, and were properly classified by Customs as "[m]arking pens having a wick-like tip of felt or other material," under item 760.15, TSUS.

CONCLUSION

In view of the foregoing, it is the determination of the court that, as to the "x-y plotters," plaintiff has rebutted the presumption of correctness that attaches to the classification by Customs, and that they are properly classifiable as "[o]ffice machines not specially provided for," under item 676.30, TSUS.

As to the plotter pens, it is the determination of the court that plaintiff has not overcome the presumption of correctness, and that the plotter pens were properly classified as "[m]arking pens having a wick-like tip of felt or other material," under item 760.15, TSUS. Judgment will issue accordingly.

(Slip Op. 90-15)

LIBBEY GLASS, DIVISION OF OWENS-ILLINOIS, INC., PLAINTIFF V. UNITED STATES, DEFENDANT, AND J.G. DURAND INTERNATIONAL, PARTY-IN-INTEREST

Court No. 84-03-00410

OPINION

[On classification of tempered glass beverageware, judgment for the defendant.]

(Decided February 13, 1990)

Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart, Charles A. St. Charles and Wesley K. Caine) and Arthur Smith, Senior Attorney, Libbey Glass Division of Owens-Illinois, Inc., of counsel, for the plaintiff.

Stuart M. Gerson, Assistant Attorney General; Joseph I. Liebman, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, U.S. Department of Justice (Barbara M. Epstein) for the defendant.

Barnes, Richardson & Colburn (David O. Elliott, Karin M. Burke and Sandra Liss Friedman) for the party-in-interest.

AQUILINO, Judge: This action, brought pursuant to 28 U.S.C. § 1581(b) and § 2631(b), challenges that part of T.D. 83-154, 17 Cust. B. & Dec. 332, 340 (1983), which denied a petition by the plaintiff domestic manufacturer of glass beverageware to reclassify under items 546.52 through 546.68 of the Tariff Schedules of the United States (TSUS) "Artic Stemware" and "Artic Tumblers" imported from France.

The stemware entered *sub nom.* "Champagne", "Wine" and "Goblet", while the tumblers were denominated "Old Fashioned", "Hi-Ball" and "Beverage". Upon entry, each was classified under item 546.38, TSUS, which provided for:

Glassware * * * pressed and toughened (specially tempered), chiefly used for preparing, serving, or storing food or beverages, or food or beverage ingredients 12.5% ad val.

The complaint alleges that the glasses should have been classified as "other" per TSUS item 546.52 ("Valued not over \$0.30 each 44% ad val.") or item 546.60 ("Valued over \$0.30 but not over \$3 each 30% ad val.").

I

Subsequent to trial of this action, Congress passed the Omnibus Trade and Competitiveness Act of 1988, Pub.L. No. 100-418, 102 Stat. 1107 *et seq.* Title I, Subtitle B thereof provided for implementation of the Harmonized Tariff Schedule (HTS), effective January 1, 1989. *See id.*, § 1217(b), 102 Stat. at 1163, 19 U.S.C.A. § 3001 note (1989 Supp.). *See also* § 1213(b) (repealing section 201 of the Tariff Classification Act of 1962, Pub.L. No. 87-456, § 201, 76 Stat. 72, 74, which provided for publication of the TSUS).

The defendant has interposed a motion to dismiss the action as now moot, which is joined by the party-in-interest, according to the following argument:

The relief available to a prevailing plaintiff in this type of action is set out in 19 U.S.C. § 1516(f). Merchandise entered *after* the date of publication in the Federal Register of a decision adverse to the Government's position is to be classified, appraised, and assessed with duty in accordance with the final judicial decision. Even if this Court were to decide that the merchandise which is the subject of this action were properly classifiable under item 546.52 or 546.60, TSUS, as claimed by Libbey, that

determination, assuming it were sustained following a possible appeal, would only have effect as to merchandise entered *after* publication in the Federal Register of notice of the court's decision.

Thus, the relief available under section 516 is prospective only, * * * and even if this Court were to determine that the merchandise at issue here were properly classifiable as claimed by Libbey, this Court could grant no relief.¹

This is the view of the defendant, notwithstanding counsel's confirmation that, at the time this action commenced,

a clear controversy existed as to the correct classification *under the TSUS* of merchandise of the same class or kind as in the "test" entry.

During the period the TSUS was in force, the case here involved a justiciable controversy, i.e. the classification of merchandise of the same class or kind as that in the "test" entry, and a judicial decision affecting that class or kind of merchandise would clearly have been constitutional, although the decision would not affect any entry completed prior to the decision. there was real likelihood that there would be future entries which would be affected by the judgment of the court.²

In other words, according to the defendant, that "real likelihood" of a meaningful judgment in this action has been eliminated by the 1988 act.

However, in regard to entries of the merchandise at issue, those no longer in the future as well as those in that category, it is instructive to quote section 1211(d) of the omnibus act:

(d) Certain Protests and Petitions Under The Customs Law.—

(1)(A) This subtitle may not be considered to divest the courts of jurisdiction over—

* * * * *

(ii) any petition by an American manufacturer, producer, or wholesaler under * * * 19 U.S.C. 1516[];

covering articles entered before the effective date of the Harmonized Tariff Schedule.

(B) Nothing in this subtitle shall affect the jurisdiction of the courts with respect to articles entered after the effective date of the Harmonized Tariff Schedule.

(2)(A) If any protest or petition referred to in paragraph (1)(A) is sustained in whole or in part by a final judicial decision, the entries subject to that protest or petition and made before the effective date of the Harmonized Tariff Schedule shall be liquidated or reliquidated, as appropriate, in accordance with such final judicial decision under the old Schedules.

¹Defendant's Memorandum in Support of Motion to Dismiss this Case on Ground of Mootness, pp. 3-5 (emphasis in original, footnotes and citations omitted).

²Defendant's Reply to Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss this Case on Ground of Mootness ("Defendant's Reply"), p. 8 (emphasis in original). See Durand's Reply to Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss, p. 1.

(B) At the earliest practicable date after the effective date of the Harmonized Tariff Schedule, the Commission shall initiate an investigation under * * * 19 U.S.C. 1332[] of those final judicial decisions referred to in subparagraph (A) that—

(i) are published during the 2-year period beginning on February 1, 1988; and

(ii) would have affected tariff treatment if they had been published during the period of the conversion of the old Schedules into the format of the Convention.

No later than September 1, 1990, the Commission shall report the results of the investigation to the President, the Committee on Ways and Means, and the Committee on Finance, and shall recommend those changes to the Harmonized Tariff Schedule that the Commission would have recommended if the final decisions concerned had been made before the conversion into the format of the Convention occurred.

(3) The President shall review all changes recommended by the Commission under paragraph (2)(B) and shall, as soon as practicable, proclaim such of those changes, if any, which he decides are necessary or appropriate to conform such Schedule to the final judicial decisions. Any such change shall be effective with respect to—

(A) entries made on or after the date of such proclamation; and

(B) entries made on or after the effective date of the Harmonized Tariff Schedule if, notwithstanding * * * 19 U.S.C. 1514[], application for liquidation or reliquidation thereof is made by the importer to the customs officer concerned within 180 days after the effective date of such proclamation.

(4) If any protest or petition referred to in paragraph (1)(A) is not sustained in whole or in part by a final judicial decision, the entries subject to that petition or protest and made before the effective date of the Harmonized Tariff Schedule shall be liquidated or reliquidated, as appropriate, in accordance with the final judicial decision under the old Schedules.

102 Stat. at 1154-55.

On its face, this statute does not lend much support to defendant's motion. The claim that plaintiff's reliance thereon is "completely misplaced * * * inasmuch as its petition does not cover articles entered prior to the effective date of the HTSUS",³ citing subsection 1211(d)(1)(A)(ii), is off the mark. The existence of entries subsequent to commencement of this action and to trial (and prior to January 1, 1989) is all but a given. Rather, defendant's better point is that affirmative relief in an action such as this is prospective the grant thereof, citing, for example, *National Corn Growers Association v. Baker*, 840 F.2d 1547, 1554 (Fed. Cir. 1988), and *National Corn Growers Association v. Von Raab*, 10 CIT 762, 764, 768, 650 F. Supp. 1007, 1009, 1012 (1986), *aff'd*, 814 F.2d 651 (Fed. Cir.

³Defendant's Reply at 7, n. 8.

1987), and since that moment has not yet arrived herein, while the HTS has, this matter is now moot.

However, as discussed in part II of this opinion, this action focuses on the meaning of "toughened (specially tempered)" in item 546.38, TSUS, *supra*, which terminology was also found in TSUS item 544.31 (covering flat safety glass). While the party-in-interest points out that the terminology has not survived for flat glass in the HTS, "toughened (specially tempered)" still applies to glass beverageware per the new Schedule's subheading 7013.29.05.

The defendant relies on *Allen Sugar Company v. Brady*, 13 CIT —, 706 F. Supp. 49 (1989), which involved a petition filed with Customs pursuant to 19 U.S.C. § 1516, contesting classification of blended sweetener products from edible preparations containing sugar. Before any action thereon by the Service, the HTS went into effect, whereupon the government moved to dismiss for lack of jurisdiction on the ground of failure to exhaust administrative remedies. The court granted the motion. In doing so, it also pointed out that HTS classification implicated an "entirely different law":

* * * [T]he question of classification under the TSUS is not germane to the question of classification under the HTSUS in this circumstance.

* * * [I]tem 1701.99.00, HTSUS, is under the auspices of different guidelines which employ a different means of characterizing the merchandise. The present guideline, General Rule of Interpretation 3(b), states that the "essential character" of a blend will be the basis of its classification, rather than the product's "chief use," which was the basis under the headnote to repealed item 183.05, Schedule 1, Part 15, Subpart B, Headnote 3, TSUS. 13 CIT at —, 706 F. Supp. at 53.

The same cannot be said of the classification in controversy here. Thus, the court is unable to conclude that this action does not lie within the zone of protection provided by section 1211(d) of the 1988 omnibus act, *supra*. Neither the defendant nor the party-in-interest points to a contrary congressional intent. Cf. H.R. Rep. No. 576, 100th Cong., 2d Sess. 549-50 (1988):

In light of the significant number and nature of changes in nomenclature from the TSUS to the HTS, decisions by the Customs Service and the courts interpreting nomenclature under the TSUS are not to be deemed dispositive in interpreting the HTS. Nevertheless, on a case-by-case basis prior decisions should be considered instructive in interpreting the HTS, particularly where the nomenclature previously interpreted in those decisions remains unchanged and no dissimilar interpretation is required by the text of the HTS.

In short, it is not clear that this action has become moot. The issue presented still lives, and the parties have a continuing, cognizable interest in its outcome. Cf. *Powell v. McCormack*, 395 U.S. 486, 496

(1969); *Murphy v. Hunt*, 455 U.S. 478, 481 (1982). Defendant's motion to dismiss for mootness is therefore denied.

II

Section 2639(a)(1) of title 28, U.S.C. provides that, in actions such as this, the decision at issue "is presumed to be correct" and the "burden of providing otherwise shall rest upon the party challenging such decision."

A

In attempting to bear its burden, the plaintiff takes the position that Congress intended that "toughened (specially tempered)" beverageware under TSUS item 546.38 disintegrate into "small rounded-edge pieces" when broken. Since, in its view, the glasses at issue did not fracture that way when tested, they were improperly classified.

In *Guardian Industries Corp. v. United States*, 3 CIT 9, 10-11 (1982), an action challenging classification under item 544.31 of flat pieces of tempered glass for use in patio doors, the court compared annealing with tempering as follows:

* * * Whereas annealing involves *gradual* cooling of the glass, tempering is accomplished by heating the glass to approximately 1200° Fahrenheit and then *rapidly* cooling the surface. In the tempering process, the outside of the glass cools faster than the inside and this differential cooling rate ultimately results in a difference in the stresses in the core of the glass and those on the outside surface or "skin" of the glass. By rapid cooling, the surface of the glass is locked into a state of high compression and the inside central portion or core is locked in compensating tension. These stresses or strains created by the differential cooling of the surfaces and core of the glass give the glass significant added strength to the extent that the tempered glass has three to four times more resistance to impact than annealed glass * * *. In addition, tempering changes the fracture characteristics of the glass upon breakage. Accordingly, while annealed glass will break into large irregular pieces with sharp jagged ends, tempered glass will shatter into many small and relatively harmless slivers, pieces or cubes, hence making it much safer to use. [emphasis in original, footnote omitted]

Evidence presented at trial herein showed that annealed glass is glass without stress. *E.g.*, Tr. at 66, 820, 886. Plaintiff's exhibit 62 states that the purposes of annealing glass are

to reduce residual stresses and to modify structure * * *. The process involves raising the glass body to the annealing temperature as defined by the annealing point, maintaining this temperature for a time sufficient to relieve existing stresses and to stabilize the glass, and then cooling the glass at a rate suffi-

ciently slow that residual stresses will not reappear when the glass temperature has reached equilibrium.⁴

The same exhibit states that tempering is a heat-treatment process which is

intended to raise the values of the residual stresses rather than to lower them as in the case of annealing. The purpose of tempering is to increase the mechanical strength of glass. Therefore, the distribution of the residual stresses, or the stress pattern, becomes a matter of great importance * * *.

In this process the temperature of the glass is raised to a value in the neighborhood of the softening point. It is then removed from the heating furnace, and the surfaces are quickly chilled.⁵

In this action, the glass is soda-lime and is not flat and uniform in thickness but rather pressed into essentially cylindrical shapes enclosed at the bottoms and of decreasing thicknesses therefrom to the top rims.⁶ Immediately recognizable as beverageware, the configurations of the six pieces under review are markedly more complex than flat pieces of glass.

Tempering of flat glass is achieved by heating it to the necessary temperature and then rapidly cooling its surfaces, generally by passing jets of compressed air over them. Jets of air were also used to cool the Durand merchandise. However, as stated, the surfaces of that glass are hardly parallel and are pressed into essentially cylindrical shapes, ranging in diameter at the mouths from approximately 2 1/4 to 3 1/2 inches and in depth from 1 1/4 to 5 1/4 inches.⁷ Evidence adduced at trial indicated, and the court finds, that uniform tempering of the six glasses, with their varying wall thicknesses and configurations, was all but beyond technological capability,⁸ at least on a commercially-feasible basis.

Uniform tempering of flat glass results in surface compression of at least 10,000 pounds per square inch. McLellan & Shand, *Glass Engineering Handbook*, p. 12-2 (3rd ed. 1984), citing 16 C.F.R. part 1201 (Consumer Product Safety Comm'n Standard for Architectural Glazing Materials). That standard prescribes the safety requirements for materials used in any of the following architectural products: (1) storm doors or combination doors, (2) doors, (3) bathtub doors and enclosures, (4) shower doors and enclosures, and (6)⁹ sliding glass doors (patio-type). When glass for these applications is tempered to such a degree, it disintegrates into the small, rounded-

⁴McLellan & Shand, *Glass Engineering Handbook*, p. 4-4 (3rd ed. 1984).

⁵*Id.* at 4-7.

⁶The bottoms of the three tumblers [plaintiff's Exs. 16A, 16E and 16F], in particular, are significantly thicker. As indicated by its nomenclature, the stemware at issue herein, namely, "Champagne" [plaintiff's Ex. 16B], "Wine" [Ex. 16C] and "Goblet" [Ex. 16D], entails mounting of the cylindrical containers on glass stems fused to circular glass bases.

⁷The court has taken these measurements from plaintiff's exhibits 16B, 16E, 16A and 16B, respectively.

⁸Diameter and depth, for example, affect ability to introduce air at the mouth to quench inside surfaces and then to exhaust it quickly. *Cf. Tr.* at 221-22, 867-68.

⁹Subsection (5) of 16 C.F.R. § 1201.1(a) has been revoked and reserved. See 45 Fed. Reg. 57,383 (Aug. 28, 1980).

edge pieces contemplated by TSUS item 544.31 when its surface is subjected, for example, to striking with a center punch.¹⁰

Both Customs and the plaintiff tested the Durand beverageware in this manner. This testing showed, and the court finds, that the six glasses "do not break into a large number of small, round-edged pieces without the presence of any shards", to quote from the Service's determination¹¹, T.D. 83-154, 17 Cust. B. & Dec. at 339. The plaintiff states:

Although this fact is not in controversy, Libbey does not rely on Customs' finding alone to establish that the six items do not disintegrate into small rounded-edged pieces. Rather, this conclusion is inescapable upon visual inspection of the actual broken specimens admitted into evidence at trial, including: the specimens referred to by Customs in its determination, Defendant's Ex. E; those used in the fragmentation tests of Libbey, Pl. Ex. 31; those used by Anchor Hocking, Pl. Ex. 32; and those used by American Glass Research (AGR), Pl. Ex. 34(a).

Complementing visual inspection are the reports of Libbey, Anchor Hocking, and AGR which evaluate the fragments in terms of objective size and weight criteria: Pl. Exs. 23(a)-(b), 24(a)-(c) and 25, respectively. Reports by plaintiff's experts applying similar objective criteria to Customs' specimens are set forth at Pl. Exs. 75(a) and 75(b). In addition to results on the six items as purchased in the marketplace, Anchor Hocking's test reports include breakage results for the six items which it retempered and for one Anchor Hocking item which it tempered for purposes of these tests. AGR's report includes, in addition to breakage results, residual stress readings for the six items obtained by use of a polarizing microscope.¹²

In other words, the "parties to this action agree that the six articles at bar do not completely dice",¹³ which fact was amply demonstrated at trial.

¹⁰A center punch imparts a minimal amount of energy necessary to cause internal forces to fracture the glass. See, e.g., Tr. at 88, 94.

¹¹Customs Internal Advice No. 76/136 [plaintiff's Ex. 5] directs that the testing be conducted as follows:

If the item is set on a solid surface and then broken by striking the inside center bottom or heel with a sharp center punch, the degree and uniformity of stress can frequently be determined. Strike the punch with a hammer, using blows of gradually increasing severity until breakage occurs.

The party-in-interest takes the position that this approach is for flat glass but that

the best overall test to determine when an item of glassware is specially tempered within the meaning of tariff item 546.38 is the thermal shock test. The three companies involved in this litigation which actually do produce fully tempered beverageware all employ the thermal shock test * * *. [I]t is performed simply by heating the glassware product in an oven and then immediately plunging it into a bath of cold water. This has the effect of reversing the stresses which were put into the glass during the tempering process * * *. The ability of the product to withstand the hot-to-cold temperature differential without breakage is a reliable indicator of its durability, which is the undisputed purpose of tempering beverageware * * *.

Post-Trial Brief for Party-in-Interest, pp. 52-53 (citations omitted).

This position has support in the record, but the court need not, and therefore does not, make a definitive finding as to the relative merits of the various testing methods. The court simply notes in passing that the Service also subjected the merchandise to a thermal shock test, as well as to "counter fall" and "stacking" tests. Tr. at 734.

¹²Post Trial Brief on Behalf of Plaintiff, pp. 64-65 (footnotes omitted).

¹³*Id.* at 64. Dicing was defined at trial as the fracturing of tempered glass into small cubical pieces. See Tr. at 405.

B

Thus, the dispositive question remains the meaning of "toughened (specially tempered)", as used in TSUS item 546.38. Again, however, there is substantial agreement among the parties, to wit, that the Durand glasses are toughened and that they are tempered. Plaintiff's disagreement focuses on the word specially, which it seeks to equate with "highly". In turn, the plaintiff equates highly with a uniform surface compression of at least 10,000 psi. This position draws upon item 544.31, which was found in Subpart B of Part 3 to TSUS Schedule 5, covering "flat glass and products thereof." To be within the ambit of that item, such glass had to be "[t]oughened (specially tempered)". The U.S. Tariff Commission's Tariff Classification Study of November 15, 1960 stated in support of this provision for that schedule (p. 137):

Item 544.31 is a new provision. It covers specially tempered glass that is more resistant to shock than ordinarily tempered glass, and, when broken, disintegrates into small rounded-edge pieces, rendering it particularly adaptable to vehicle glazing. Somewhat lower in cost than laminated glass, it is extensively used as a substitute for laminated glass in the glazing of automobiles.

Item 546.38 was not accompanied by a similar explanatory note, but the plaintiff argues that Congress clearly intended to assign the same meaning to "toughened (specially tempered)" in both instances as the items are *in pari materia*.

On its part, defendant's summary of argument is as follows:

Congress intended that *some* tempered glasses for serving beverages be classified under item 546.38, TSUS, as "toughened (specially tempered)" glassware, chiefly used for serving beverages. The six styles of the Durand beverage glasses at issue here are as highly tempered as any beverage glasses commercially produced. Therefore, the Durand glasses at issue were properly classified under TSUS item 546.38.¹⁴

While the party-in-interest does not disagree with defendant's ultimate position, Durand argues in support thereof (1) that TSUS items 544.31 and 546.38 are not *in pari materia* and therefore "toughened (specially tempered)" need not be interpreted the same way for both and (2) that that term in item 546.38 encompasses glass tableware articles that have been full-surface tempered for the special purpose of achieving a significantly greater degree of durability than ordinary annealed glass.

The court, after viewing the glass fragments and pieces produced at trial and considering the testimony of the witnesses thereon, finds each of the six glasses to be fully tempered, albeit to varying degrees from one point to another on each unit; at best, only certain sections of the glasses in question approached the degree of temper-

¹⁴Defendant's Brief, pp. 18-19 (emphasis in original).

ing advocated by the plaintiff. The result of the full tempering was to make each piece toughened overall¹⁵—in comparison with ordinary annealed or partially tempered¹⁶ glasses, the commercial alternatives.

As recited above, item 544.31 was set forth in the Schedule 5 Tariff Classification Study of November 1960 for flat safety glass. By that time, the process for the full tempering of beverageware had been developed in France. Some two years later, Compagnie de Saint-Gobain recommended to the Tariff Commission a "breakout" from the Tariff Classification Act of 1962 for "[f]ully tempered table and kitchen glassware" upon a representation of "superiority over ordinary glass tableware" on the basis of durability. Plaintiff's Ex. 1. The word fully was suggested "to distinguish between glass, the entire surface[e] of which is fully tempered, and that in which the temper is only partial." *Id.* Thereafter, the Commission's TCS Fifth Supplemental Report dated May 16, 1963 recommended (at page 37) adoption of item 546.38 per the following explanation:

This provision will continue the existing rate treatment for the glassware in question. Such glassware is currently dutiable under paragraph 218(g), Tariff Act of 1930.

Obviously, this explanation did not tie the merchandise to its characteristics upon fracture, as did the earlier explanation for flat glass under item 544.31. Indeed, the implication was that the new product simply belonged in the old Tariff Act category referenced. Be that as it may, the recommendation was accepted by Congress and the President as stated, which, at the time, applied in essence only to the Saint-Gobain glassware. It was not tempered to the degree the plaintiff now proffers,¹⁷ just as the comparable Durand merchandise now is not. But that beverageware is the most highly tempered on the market, a fact the plaintiff domestic manufacturer's own witnesses admitted. *See, e.g., Tr.* at 330, 353, 490, 491, 493.

The court finds that the clear purpose of this tempering is durability, whereas safety is clearly the primary goal of tempering large and inherently dangerous pieces of flat glass for automobiles and buildings. The products are not analogous, and, although safety is always a concern, the Durand merchandise was not proven at trial to be particularly dangerous upon breakage. Moreover, annealed beverageware, which expectedly fractures into sharp pieces, has not been considered unsafe for use.

Although item 544.31 and item 546.38 ultimately became law at the same time,¹⁸ the derivation and context of each were different. As the courts have stated,

¹⁵The court notes in passing that testimony at trial indicated that tempering beverageware too highly can make it too prone to fracture to be of utility. *See, e.g., Tr.* at 284, 327, 494-95.

¹⁶The rims, for example, of some beverageware are tempered in order to toughen that area, which is often the most fragile.

¹⁷*Cy. Tr.* 998-99.

¹⁸*Cy. Proclamation No. 3548, 28 Fed. Reg. 9,279 (Aug. 23, 1963).*

The starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.

Consumer Product Safety Comm'n v. GTE Sylvania, Inc. 447 U.S. 102, 108 (1980). See, e.g., *Madison Galleries, Ltd. v. United States*, 870 F.2d 627, 629-30 (Fed. Cir. 1989); *Moss Manufacturing Co. v. United States*, 13 CIT —, —, 714 F. Supp. 1223, 1227 (1989), appeal docketed, No. 89-1544 (Fed. Cir. June 20, 1989). Following this "familiar canon of statutory construction", this court is unable to discern a clearly expressed legislative intention that the Customs Service apply item 546.38, TSUS other than occurred in this matter. The explanatory note accompanying item 544.31 was not expressly applicable to the later provision. On its face, that item, 546.38, contemplated that glassware within its purview be toughened, in particular by tempering, to increase resistance to mechanical and thermal shock. Toughening by some other means is not within the meaning of the item, nor is plaintiff's proposition that "specially" means "highly", notwithstanding the evidence showing the Durand merchandise to have the highest degree of tempering available.

In classifying this merchandise under item 546.38, Customs conducted tests ranging in sophistication from studying the fragments caused by center-punch destruction of the glasses—to thermal shock—to simply dropping them on the floor. The evidence presented at trial did not overcome the presumption of correctness of the Service's decision based on the results of those tests. That is, Customs determined that the glass was toughened by special tempering.

Judgment must therefore enter in favor of the defendant.

(Slip Op. 90-16)

FORMER EMPLOYEES OF SOUTHERN TRIANGLE OIL CO., PLAINTIFF V. THE U.S.
SECRETARY OF LABOR, DEFENDANT

Court No. 89-03-00158

MEMORANDUM OPINION AND ORDER

(Decided February 14, 1990)

Charles Pierson, pro se.

Stuart M. Gerson, Assistant Attorney General; David M. Cohen, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (Vanessa P. Sciarra) for the defendant.

MUSGRAVE, Judge: The present action was initiated by Mr. Charles Pierson, a former employee of Southern Triangle Oil Company, in the form of a letter of summons and complaint filed with the Court on March 27, 1989. Mr. Pierson alleges that he was separated from employment with Southern Triangle as a result of foreign oil imports, and on this basis he contests his exclusion from eligibility for worker adjustment assistance benefits.

Southern Triangle drills for and sells oil and natural gas. In response to a petition filed by other employees of the company on November 18, 1988, the United States Department of Labor ("Department") initiated an adjustment assistance investigation. From this investigation the Department determined that "U.S. imports of crude oil increased absolutely and relative to U.S. shipments in 1987 compared to 1986 and in the January-September period of 1988 compared to the same period of 1987." Department of Labor Certification Regarding Eligibility to Apply for Adjustment Assistance, Administrative Record, Public File, at 30. The Department further found that "[t]he majority of [Southern Triangle's] major customers increased their imports of crude oil in the January-June period of 1988 compared to the same period of 1987 and decreased purchases from Southern Triangle Oil Company." *Id.* at 31. The Department concluded that "increases of imports of articles like or directly competitive with crude oil contributed importantly to the decline in sales or production and to the total or partial separation of workers at Southern Triangle Oil Company." *Id.* Based on these determinations, the Department certified as eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974 "[a]ll workers of Southern Triangle Oil Company, Mt. Carmel, Illinois and operating at various locations in [Illinois, Indiana, Ohio, and West Virginia] who became totally or partially separated from employment on or after November 15, 1987 * * *." *Id.*

Mr. Pierson states in his complaint that he worked for Southern Triangle for eleven years drilling for oil on various of the company's oil rigs. Mr. Pierson listed his recent wages from the company as follows: 1981—\$29,700, 1982—\$25,598, 1983—\$23,720, 1984—\$21,308, 1985—approximately \$15,000, and 1986—\$3,378. Mr. Pierson states that at the time of his final, complete separation from employment with the company in September 1987 he had earned a total of \$1,635 during the first two quarters of that year. Notwithstanding the certification by the Labor Department of Southern Triangle employees for eligibility for adjustment assistance, the Department of Employment Security of the State of Illinois (Mr. Pierson was working with an Illinois branch of Southern Triangle) denied adjustment assistance to Mr. Pierson, explaining, "You are not entitled to trade adjustment assistance because your last separation occurred before the impact date."

In his complaint, Mr. Pierson describes a period of irregular wage and employment levels at Southern Triangle in recent years as the company moved oil rigs out of production due to the increased import competition. He states that he was separated from employment with the company completely and finally in September 1987. The Illinois Department of Employment Security in its notification to Mr. Pierson of his ineligibility for assistance lists his separation date as 10/5/85. Whichever of these two separation dates is used, Mr. Pierson's last separation from Southern Triangle occurred before the November 15, 1987 impact date established by the Department of Labor.

Section 2273(b) of Title 19 of the United States Code, regarding certification of workers for trade adjustment assistance, states,

A certification under this section shall not apply to any worker whose last total or partial separation * * * occurred—

- (1) more than one year before the date of the petition on which such certification was granted, or
- (2) more than 6 months before the effective date of this part.

The petition of the Southern Illinois employees was filed with the Department on November 18, 1988, and the date of Mr. Pierson's last total or partial separation from the company was more than one year before that date.

This one-year limitation has consistently been held to be an inflexible barrier which if not met by petitioners for assistance will bar their claims completely; the reason that has been given is that petitioners who fail to meet this requirement are not within the category of persons Congress intended to aid with the adjustment assistance legislation. *Lloyd v. U.S. Department of Labor*, 637 F.2d 1267 (Fed. Cir. 1980).¹ In *Lloyd*, as in the present case, the petitioners before the Court were separated from employment prior to the Labor Department's stated impact deadline, and more than one year before the date on which the relevant petition had been filed. In upholding the denial of the petitioners' eligibility by the Labor Department, the Court noted that two proposed modifications of the one-year rule had failed to be finally enacted by Congress, one of them even after having been favorably reported out of committee. Based on this fact, the Court felt constrained by the apparent will of Congress to hold that the one-year limitation was an inflexible bar against any petitions that did not meet its requirements. The Court stated,

Petitioners present a sympathetic argument. But in view of the congressional purpose and history of this provision and its proposed amendments, we must apply the one-year rule as it

¹In the context of the present case, particularly Mr. Pierson's reported income fluctuations, it is noteworthy that the Court of Appeals in *Lloyd* also stated that a reduction in salary to eighty percent or less of the petitioner's previous average weekly salary may constitute a "partial separation" under the legislation. 637 F.2d at 1272, citing 19 U.S.C. § 2319(a)(3).

was enacted. Efforts to ameliorate the rule should be directed to Congress.

637 F.2d at 1271.

Such efforts were apparently so directed. In 1988 Congress enacted Public Law 100-418 which amended certain parts of the trade adjustment assistance legislation. Section 1421(a)(1)(B) of the amendment provides as follows:

(B) Notwithstanding section 223(b) of the Trade Act of 1974 [19 U.S.C. § 2273(b), the one-year rule], or any other provision of law, any certification made under subchapter A of chapter 2 of title II of such Act [19 U.S.C. § 2272] which—

- (i) is made with respect to a petition filed before the date that is 90 days after the date of enactment of this Act, and
- (ii) would not have been made if the amendments made by paragraph (A) had not been enacted into law, shall apply to any worker whose most recent total or partial separation from the firm, or appropriate subdivision of the firm, described in [19 U.S.C. § 2272(a)] occurs after September 30, 1985.

The Labor Department's certification of the other Southern Triangle employees was made under 19 U.S.C. § 2272 as stated in the first phrase of the amendment excerpted above, and the company is thus "the firm * * * described in [19 U.S.C. § 2272(a)]" for purposes of the present case, as stated in the last part of the excerpt. Congress further amended the statute as follows, in subparagraph (A) of subsection (a)(1) of the amendment, immediately preceding the subparagraph excerpted above:

Any firm, or appropriate subdivision of a firm, that engages in exploration or drilling for oil or natural gas shall be considered to be a firm producing oil or natural gas.

and

Any firm, or appropriate subdivision of a firm, that engages in exploration or drilling for oil or natural gas, or otherwise produces oil or natural gas, shall be considered to be producing articles directly competitive with imports of oil and with imports of natural gas.

It being clear that the Southern Triangle company and the Department's certification of the company's other employees for assistance both fall within section 1421(a)(1)(B) of the amendment, the other three requirements of that section may be applied to the present case. These requirements are as follows: (1) the certification at issue must have been made with respect to a petition filed earlier than 90 days after the enactment of the amendment, i.e., before November 23, 1988; (2) the certification must be one that would not have been made but for the amendments made by subparagraph (A) of the amendment; and (3) the worker at issue must have been most

recently separated from the relevant firm, totally or partially, after September 30, 1985.

The petition pursuant to which the Southern Triangle workers were certified for benefits was filed with the Labor Department on November 18, 1988, before the statutory ninety-day period expired on November 21, 1988; therefore, the first statutory requirement is met.

The third requirement is also met here. Mr. Pierson states in his complaint that his last, complete separation from Southern Triangle occurred in September 1987, well within the statutory deadline of later than September 30, 1985. Moreover, even using the date of separation adopted by the State of Illinois in its denial of certification for Mr. Pierson, October 5, 1985, his time of separation still falls within the statutory period. As noted earlier, the courts have consistently held that the statutory time deadlines in the trade adjustment assistance legislation are inflexible. As another example, the Court of International Trade in *Virginia Washko, et al. v. United States*, 4 CIT 271 (1982) held that an action filed by workers challenging a negative adjustment assistance determination by the Secretary of Labor ("Secretary") was untimely filed and dismissed his case, where the petition was filed sixty-one days after the Secretary published his determination in the Federal Register, one day beyond the statutory limit of sixty days. Just as these time limits are absolute when missed by petitioners, so they are controlling when met by petitioners. Although only by five days, Mr. Pierson's separation date falls within the statutory period; the third requirement of the amendment is therefore fulfilled as well.

The second requirement, unlike the first and third, does not entail the calculation of specific deadlines, but instead calls for a legal analysis of subparagraph (A) of subsection (a)(1) of the 1988 amendment as it relates to the pre-amendment law. In such an analysis, it is not so much the fact-finding expertise of the agency, but rather the special competence of the courts for legal judgment that is more important.

In subparagraph (A) Congress rebuked the argument previously made by the Government and accepted by courts that workers engaged in drilling or exploration for oil were not "producing" an "article" as required by the statute to qualify for worker adjustment assistance. See, for example, *Former Employees of Zapata Offshore Co. v. United States*, 11 CIT 841 (1987).

The relevant language in subparagraph (A) unambiguously declares,

Any firm, or appropriate subdivision of a firm, that engages in exploration or drilling for oil or natural gas shall be considered to be a firm producing oil or natural gas.

Any firm, or appropriate subdivision of a firm, that engages in exploration or drilling for oil natural gas, or otherwise produces oil or natural gas, shall be considered to be producing ar-

ticles directly competitive with imports of oil and with imports of natural gas.

The Committee Report accompanying this legislation stated,

The purpose of this amendment is to facilitate the availability of benefits under the trade adjustment assistance program for workers employed by firms engaged in exploration or drilling for crude oil or natural gas.

Omnibus Trade and Competitiveness Act of 1988, H.R. Rep. No. 576, 100th Cong., 2d Sess. 694 (1988).

The amendment, then, clearly extends to workers like Mr. Pierson who lose their jobs drilling for oil as a result of increases in oil imports.

The department has nevertheless argued even since the adoption of the amendment that the amendment was intended to apply only to displaced workers who were employed by firms engaged *solely* in drilling or exploration for oil or natural gas, not firms that also engage in "production" of these products. This is precisely the type of casuistic distinction that Congress rejected with the 1988 amendment, and the distinction was since soundly rejected in *Former Employees of Bass Enterprises Production Company v. United States*, 13 CIT —, 706 F. Supp. 897 (1989).

In *Bass* the government argued that

the 1988 amendment does not apply to this case since Bass is not a separate service company. Rather, Bass *both explores for and produces* the articles under investigation.

Judge DiCarlo, who had earlier accepted the government's production-exploration distinction in *Zapata*, before the 1988 amendment, dismissed this argument, emphasizing the plain language of the amendment which changes the statute with respect to "[a]ny firm, or appropriate subdivision of a firm, that engages in exploration or drilling for oil or natural gas, or otherwise produces oil or natural gas". *Id.* This decision is also supported by the following statement from the House Report accompanying the amendment:

Because exploration, drilling, and production activities in the crude oil and natural gas industries are *inextricably linked*, the amendment provides that workers engaged in *exploration, drilling or production* of either crude oil or natural gas shall be considered as *producing* either product.

H. Rep. No. 576 at 694 (emphasis added).

Based on the unambiguous language of subparagraph (A), its accompanying legislative history, and the previous decision of this Court, it is clear that Mr. Pierson and Southern Triangle are precisely the kind of worker and company to which Congress intended the

amendment to apply. Therefore, the certification of the company employees qualified under the second requirement.

Where these three requirements are met, subparagraph (B) of the amendment commands that, "[n]otwithstanding section 223(b) of the Trade Act of 1974 [the one-year rule], or any other provision of law" (emphasis added), a certification within the scope of the amendment "shall apply to any worker" of the certified firm who meets the amendments' requirements. Southern Triangle is a firm within the scope of the amendment, and both the certification of its other employees and the petition and separation dates of Mr. Pierson meet the three requirements of the amendment. Therefore, Mr. Pierson is entitled by the amendment to benefits under the certification granted to his fellow workers.

The government argues that Mr. Pierson's complaint is not with the Department of Labor which certified the other Southern Triangle employees, but, rather, with the State of Illinois Department of Employment Security which failed to allow Mr. Pierson to participate in the assistance program because of the date of his separation from the company. Based on this characterization of the dispute, the government contends that this Court lacks jurisdiction over the case, and cites as support this Court's decision in *Former Employees of ITT v. Secretary of Labor*, 12 CIT —, Slip Op. 88-121 (Sept. 12, 1988). This characterization of the action is inaccurate if not disingenuous.

In administering the adjustment assistance program, the Secretary of Labor is authorized by statute to enter into agreements with "cooperating States" and "cooperating State agencies" pursuant to which agreements the cooperating State authority, "as agent of the United States", will accept applications for adjustment assistance and perform various other functions in administering the programs at the state level. 19 U.S.C. § 2311 (1988). Paragraph (d) of section 2311 prescribes the rule governing judicial review of decisions made by cooperating state authorities in administering the adjustment assistance program:

A determination by a cooperating State agency with respect to entitlement to program benefits under an agreement is subject to review in the same manner and to the same extent as determinations under the applicable State law and only in that manner and to that extent.

The *Former Employees of ITT* case involved a cooperating state agency, the Tennessee Department of Employment Security, that was administering a trade adjustment assistance program pursuant to a certification made by the Secretary of Labor. The plaintiffs in that case, former employees of ITT, questioned the denial by the State agency of permission for the plaintiffs to participate in the program. This Court dismissed the plaintiffs' claim, however, because the claim had not been filed within the statutorily required period of sixty days from the date of the Secretary's publication of

notice of the Labor Department's determination in the case. While the Court dismissed the case on this basis, it also briefly mentioned that under section 2311(d) the plaintiffs' challenge to the actions of the State agency were not properly before the Court of International Trade.

While Mr. Pierson does challenge the failure of the State administering authority to allow him to participate in the Federally-authorized adjustment assistance program at issue, as did the plaintiffs in *ITT*, (and while the plaintiffs in both cases additionally disagreed with the particular "impact dates" derived by the Labor Department) there is a critical distinction between the two cases: *ITT* did not involve the recently-enacted retroactivity amendment applicable to workers in the oil and gas industry, such as Mr. Pierson. While Mr. Pierson disagrees with the failure of the Illinois administering agency to allow him to participate in the adjustment assistance program for former Southern Triangle employees, his real complaint in this case is clearly with the U.S. Labor Department.

It was indeed the Illinois Department of Employment Security that denied Mr. Pierson assistance under the program, but it did so because under the terms of the Labor Department's certification in this case he in fact did *not* qualify for assistance. Nevertheless, as was shown above, Mr. Pierson *does* qualify for participation in the program under the recently-enacted retroactive provision applicable to oil and gas workers. The administrative record in this case, moreover, suggests that the Labor Department was not unaware of this fact. In the original version of its certification of eligibility of Southern Triangle employees to apply for worker adjustment assistance, dated January 31, 1989, the Department made this certification "[i]n accordance with the provisions of the Act and the retroactive provisions of Section 1421(a)(1)(B) of the Omnibus Trade and Competitiveness Act of 1988" (emphasis added). Following this document in the record, however, is a "corrected copy" of the certification. The only noticeable "correction" in this latter version is the deletion of that part of the above quoted phrase referring to the retroactive provisions of the Act. In its final, "corrected" form, then, the certification merely states that it is "[i]n accordance with the provisions of the Act"; all reference to the retroactive provision is unexplainedly deleted.

It is, as noted, the participating State agencies that administer the worker adjustment assistance programs at the operational level. But these agencies administer the programs *as formulated by the Department of Labor* (indeed, in the language of the statute, "as agent[s] of the United States"). It is in turn the responsibility of the Department of Labor, where assistance is warranted, to so formulate the programs as to implement the will of Congress in enacting the trade adjustment assistance legislation. If the Department formulates the particular program in a manner contrary to the governing statute and Congressional intent, then the State agency,

bound by the parameters of the Department's Certification, will be bound to administer the program in that same manner.

The Department so formulated its Certification in this case. The Certification states that Southern Triangle and its former employees were engaged in the business of drilling for, extracting, and selling crude oil and natural gas. The retroactivity amendment mandates that any certification of employees of such a company "shall apply to" any worker who qualifies under the amendment, "[n]otwithstanding section 223(b) [the one-year rule] * * * or any other provision of law." The broad, sweeping language of this highlighted portion demonstrates the intent of Congress that if a worker qualifies under the specific, strictly limited criteria of the amendment, as Mr. Pierson was shown to, *no provision of law*, whether the one-year rule, the impact date rule, or otherwise, should exclude the worker from participation in the program. Therefore, the retroactive provisions of the 1988 legislation clearly apply in this case and would extend the coverage of the present Certification to Mr. Pierson. After deleting from its Certification all reference to the retroactive provisions, the Department can not now exculpate itself by referring Mr. Pierson to the State agency that is bound to administer that very Certification according to the parameters stated therein.

The Department has contributed very little to these proceedings before this Court. While it was required by the Rules of the Court to file an answer within sixty days of the filing of Mr. Pierson's complaint, the Department filed no answer nor any other communication regarding this action for seven months after the complaint was filed, reportedly because it "overlooked" this requirement. When the Department did respond at that late date, at the request of the Court, its response was in the form of a motion to dismiss the case because Mr. Pierson had overlooked the posting of a twenty-five dollar filing fee with his complaint. The Court, moreover, was forced to request two times the filing by the government of a proposed protective order pursuant to which Mr. Pierson could gain access to the entire administrative record in his action.

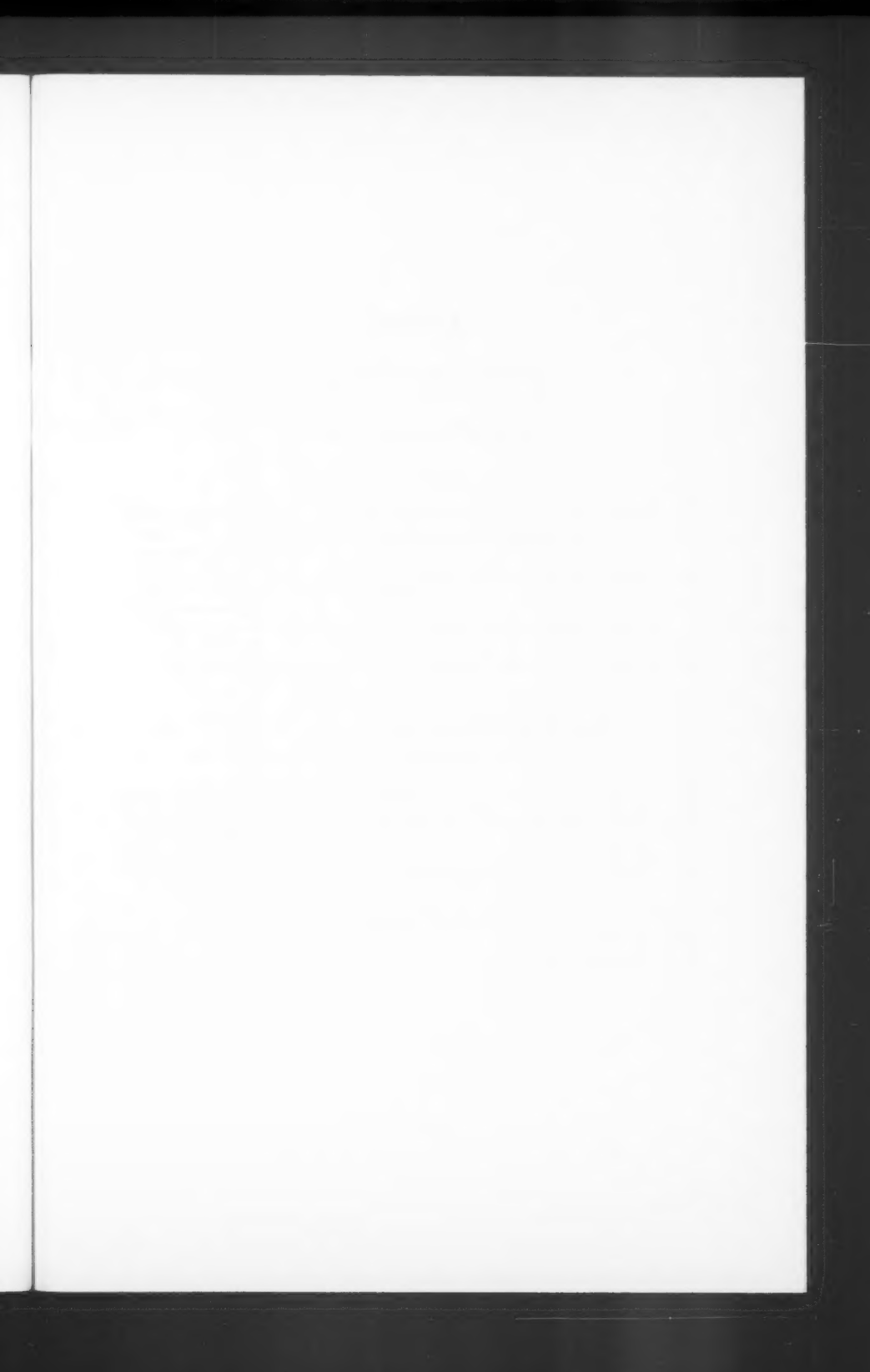
These circumstances are detailed more fully in the Memorandum Order of November 21, 1989 to which the Court finally resorted to obtain the proposed protective order. The Court stated in that order its belief that it surely was not the intent of Congress in enacting the adjustment assistance legislation and the provisions therein for judicial review for applicants to endure such delay in the resolution of their applications as Mr. Pierson has in this case. This belief is further reinforced by the actions of Congress in amending the applicable legislation to protect workers in the oil and gas industries. Because of these considerations, the Court urgently desires that the Department of Labor again correct its Certification in this case to make it clear to the State administering authorities that the retroactive provisions of the 1988 Trade Act apply to the certification of

eligibility to apply for worker adjustment assistance of the former employees of Southern Triangle, including Mr. Charles Pierson.

Accordingly, the Secretary of Labor's determination is vacated and the action is remanded. The Secretary is directed to prepare and issue a final determination consistent with the foregoing opinion within thirty days of the date of this opinion, and, through counsel, to provide the Court with a copy of the revised determination within five days of its issuance.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and rate	Item No. and rate		
C90/46	Carman, J. February 16, 1980	C. Itoh & Co.	88-8-00591	618.25 3%	806.30 Free of duty	Agreed statement of facts	Seattle Aluminum sheet
C90/47	Carman, J. February 16, 1980	Eonic, Inc.	88-9-00605	700.95 12.5%	700.45 10% Item 700.35 8.5%	Agreed statement of facts	Boston Leather trimmed shoes
C90/48	Carman, J. February 16, 1980	Huffy Corp.	88-7-00481	732.44 7.1%	912.10 Free of duty	Agreed statement of facts	Seattle Bicycle front and rear derailleurs
C90/49	Carman, J. February 16, 1980	Marubeni America Corp.	88-8-00592	644.09 5.8% 618.25 3%	806.30 Free of duty	Agreed statement of facts	Seattle Aluminum foil





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